IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1013

PEGGY J. CONNOR, HENRY J. KIRKSEY, ET AL.,
Petitioners,

v.

HONORABLE J. P. COLEMAN, United States Circuit Judge, HONORABLE DAN M. RUSSELL, JR., United States District Judge, HONORABLE HAROLD COX, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS, AND BRIEF IN SUPPORT THEREOF

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December, 1978

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Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Petitioners, by their attorneys, pursuant to 28 U.S.C. § 1651 and U.S. Sup. Ct. Rule 31(3) respectfully move the Court for leave to file their Petition for a Writ of Mandamus To Enforce the Mandate of This Court, attached hereto, and further move the Court that an order and rule be entered and issued directing Honorable J. P. Coleman, United States Circuit Judge, Honorable Dan M. Russell, Jr., United States District Judge, and Honorable Harold Cox, United States District Judge, and the United States District Court for the Southern

District of Mississippi, to show cause, if any there be, why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioners should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,

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Respondents.

PETITION FOR A WRIT OF MANDAMUS TO ENFORCE THE MANDATE OF THIS COURT

Petitioners, Peggy J. Connor, Henry J. Kirksey, Annie E. Taylor, Augusta Wheadon, Ralthus Hayes, Catherine Crowell, Elijah Conwell, Jr., and Alma Carnegie, on behalf of themeselves and all others similarly situated, and the Mississippi Freedom Democratic Party, an unincorporated association, respectfully pray that a writ of mandamus issue to compel the respondents, within 30 days of the issuance of the writ, to enter a final judgment embodying a permanent reapportionment plan for the Mississippi Legislature for the 1979 state legislative elections that complies with this Court's prior decisions

in *Connor* v. *Finch*, 431 U.S. 407 (1977), and *Connor* v. *Waller*, 421 U.S. 656 (1975).

Petitioners are the black registered voters of Mississippi who are plaintiffs in the thirteen-year-old Mississippi legislative reapportionment case which has been before this Court five times in this decade, and in which this Court's latest decision was handed down last Term in *Connor* v. *Finch*, *supra*. This petition is being filed to enforce the mandates and directions of this Court to the three-judge District Court issued in *Connor* v. *Finch*, *supra*, and *Connor* v. *Coleman*, 425 U.S. 675 (1976), expeditiously to promulgate a permanent court-ordered plan which meets constitutional requirements.

OPINIONS AND ORDERS BELOW

To date no final judgment embodying a permanent court-ordered legislative reapportionment plan for the Mississippi Legislature for the 1979 legislative elections has been entered, nor has any final opinion of the District Court been entered. Copies of the District Court docket entries since the issuance of this Court's mandate in *Connor* v. *Finch*, *supra*, are attached as Appendix A. On December 12, 1977, the District Court issued a temporary restraining order staying a special election to fill a vacancy in the Mississippi Legislature, and stated that after completion of the evidentiary hearings in the action on February 14, 1978, the District Court "will make a decision in this matter, promptly" (Appendix B, attached). On July 31, 1978, the Attorney General of the United States lodged an objection pursuant to § 5 of the Voting Rights Act of 1965 based on dilution of black voting strength to the 1978 statutory plan enacted by the Mississippi Legislature, Miss. Laws, 1978, chs. 515 and 535, and a copy of that § 5 objection letter is attached as Appendix C.

JURISDICTION

This Court has jurisdiction to issue the requested writ of mandamus to direct the District Court to comply with this Court's mandates in *Connor* v. *Finch*, *supra*, and *Connor* v. *Coleman*, *supra*, and to compel the District Court to exercise its jurisdiction to (1) enter a permanent court-ordered plan in time for the imminent 1979 legislative elections, and (2) in time for any party aggrieved by the final judgment of the District Court to obtain effective appellate review in this Court of that plan "so that the citizens of Mississippi at long last will be enabled to elect a legislature that properly represents them." *Connor* v. *Finch*, *supra*, 431 U.S. at 426. This Court's jurisdiction is invoked pursuant to the All Writs Act, 28 U.S.C. § 1651, and U.S. Sup. Ct. Rule 31(3). The following cases sustain the jurisdiction of this Court by mandamus to force a lower court to comply with the mandate of this Court: *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Will* v. *United States*, 389 U.S. 90, 95-96 (1976); *United States* v. *United States District Court*, 334 U.S. 258, 263 (1948); *Baltimore & Ohio R. Co.* v. *United States*, 279 U.S. 781 (1929); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); cf. *United States* v. *Smith*, 331 U.S. 469 (1947). Jurisdiction also is based on the power of this Court to entertain mandamus proceedings against a three-judge District Court in a case directly appealable to this Court, *Williams* v. *Simons*, 355 U.S. 49 (1957), and in cases in which the appellate jurisdiction of this Court is defeated by the action of the lower court, *Ex parte United States*, 287 U.S. 241 (1932).

QUESTIONS PRESENTED

Whether after thirteen years of litigation which have failed to result either in a constitutional legislative apportionment of the Mississippi Legislature or a court-

ordered plan which meets constitutional and judicial requirements, and after the District Court has been specifically directed by this Court more than a year and a half ago to act expeditiously to promulgate a new plan which meets the requirements of the Constitution and this Court's prior decisions, the District Court may continue to delay rendering a final judgment embodying a court-ordered plan for the imminent 1979 legislative elections.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a), the All Writs Statute, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

On May 31, 1977—more than a year and a half ago—this Court reversed the District Court's 1976 plan, remanded *Connor* v. *Finch* back to the District Court to draw up "a new plan," *Connor* v. *Finch*, 431 U.S. 407, 425 (1977), and directed:

> "The task facing the District Court on remand must be approached not only with great care, but with a compelling awareness of the need for its expeditious accomplishment, so that the citizens of Mississippi at long last will be enabled to elect a legislature that properly represents them." *Id.* at 426.

The District Court has not yet promulgated a new court-ordered legislative reapportionment plan in compliance with this Court's directives in *Connor* v. *Finch, supra*, and has in effect once again delayed consideration of a permanent court-ordered plan for the 1979 legislative elections. See *Connor* v. *Coleman*, 425 U.S. 675 (1976).

A. Prior Proceedings

The prior history of this case is charted in this Court's opinion last Term in *Connor* v. *Finch*, 431 U.S. at 410-12. "Twelve years have passed [now more than thirteen] since this litigation began, but there is still no constitutionally permissible apportionment plan for the Mississippi Legislature," 431 U.S. at 425. Legislative reapportionment plans enacted in 1962, 1966, and 1971 were struck down by the District Court for unconstitutional malapportionment. The 1967, 1971, and 1975 state legislative elections all were held under District Court-ordered plans which relied extensively on multi-member districts in both houses of the Legislature, and which contained excessive deviations from population equality among the districts.[1] *Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss. 1967) (three-judge court); *Connor* v. *Johnson*, 330 F. Supp. 506 (S.D. Miss. 1971), *vacated and remanded sub nom. Connor* v. *Williams*, 404 U.S. 549 (1972); Appendix, *Connor* v. *Finch*, 431 U.S. 407, Vol. II, 207-38 (1975 plan).

Both the 1971 court-ordered plan and the 1975 court-ordered plan evaded appellate review on their merits in this Court. In 1971 the District Court failed altogether to formulate a final plan for Mississippi's three largest counties—Hinds, Harrison, and Jackson Counties, created large multi-member districts for those counties, and indicated its intent to appoint a Special Master as of January 1, 1972 to make findings regarding the feasibility of single-member districts for those counties. *Connor* v.

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[1] The total deviations in the 1967 court-ordered plan were 20.83% in the House and 23.24% in the Senate. The total deviations in the 1971 and 1975 court-ordered plans were 19.73% in the House and 18.90% in the Senate, excluding floterial districts. Brief for Private Appellants, *Connor* v. *Finch*, 431 U.S. 407, pp. 9-10. In *Connor* v. *Finch, supra*, this Court declared deviations of 19.3% in the House and 16.5% in the Senate in the 1976 court-ordered plan unconstitutional by Equal Protection standards.

Johnson, supra, 330 F. Supp. at 519. Interim relief for Hinds County for the 1971 elections, ordered by this Court, *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971), was denied because the District Court found insurmountable difficulties. 330 F. Supp. 521. On the appeal from the 1971 court-ordered plan, this Court declined to review the prospective validity of the 1971 plan on its merits in the absence of a final plan for those three counties, holding that "it would be preferable to have before us a final judgment with respect to the entire State." *Connor* v. *Williams*, 404 U.S. 549, 551-52 (1972). Relying on the District Court's stated intention to appoint a Special Master as of January 1, 1972 to take testimony and make findings regarding the subdivision of Hinds, Harrison, and Jackson Counties into single-member districts, this Court vacated the judgment and remanded with directions to the District Court that "[s]uch proceedings should go forward and be promptly concluded." 404 U.S. at 551-52. No Special Master was appointed.

In 1975 the District Court approved as constitutional the Mississippi Legislature's 1975 statutory plan, and this Court reversed, holding that the legislative plan could not be effective as law until it had been submitted and approved under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *Connor* v. *Waller*, 421 U.S. 656 (1976). The Court also directed:

> "This reversal is, however, without prejudice to the authority of the District Court, if it should become appropriate, to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in Mahan v. Howell, 410 U.S. 315 (1973); Connor v. Williams, 404 U.S. 549 (1972); Chapman v. Meier, 420 U.S. 1 (1975)." 421 U.S. at 656-57.

When the legislative plan was submitted to the Attorney General of the United States, an objection was lodged

based on dilution of black voting strength, and the District Court then proceeded to implement a temporary court-ordered plan for the 1975 elections only which was identical to the objected-to legislative plan except for seven districts, again relying extensively on multi-member districts and excessive population variances.

Because the temporary 1975 court-ordered plan was ordered into effect on July 11, 1975—only 25 days before the August 5 legislative primary elections (Appendix, *Connor* v. *Finch*, *supra*, Vol. II, p. 207)—no effective appeal to this Court could be taken. But plaintiffs did file a motion to alter or amend the judgment pointing out that the temporary 1975 plan violated the requirements for court-ordered plans established by this Court's prior decisions cited in *Connor* v. *Waller*, *supra*.

In a subsequent order, the District Court indicated its "firm determination" (Order of Aug. 1, 1975) to promulgate a permanent plan by February 1, 1976. When on January 29, 1976, the District Court ordered a stay of further proceedings pending the outcome of other cases in this Court raising reapportionment issues, this Court on May 19, 1976 allowed the filing of a petition for a writ of mandamus and directed the District Court

> "to 'bring this case to trial forthwith . . .' and schedule a hearing to be held within 30 days on all proposed permanent reapportionment plans to the end of entering a final judgment embodying a permanent plan reapportioning the Mississippi Legislature in accordance with law to be applicable to the election of legislators in the 1979 quadrennial elections, and also ordering any necessary special elections to be held to coincide with the November 1976 Presidential and congressional elections, or in any event at the earliest practicable date thereafter." *Connor* v. *Coleman*, 425 U.S. at 679.

A hearing was held and a final judgment embodying a permanent plan was entered on November 18, 1976. On appeals by all the parties, including the United States as plaintiff-intervenor, this Court reversed, holding that the District Court's 1976 permanent plan failed "to meet the most elemental requirement of the Equal Protection Clause in this area—that legislative districts be 'as nearly of equal population as is practicable.'" *Connor* v. *Finch*, 431 U.S. at 409-10. In addition, this Court gave further guidance to the District Court on plaintiffs' challenges that the 1976 plan's apportionment of some districts impermissibly diluted black voting strength, and held:

> "It is therefore imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges [footnote omitted]." 431 U.S. at 425.

B. Proceedings on Remand

On remand, a trial has been held, and at least seven proposed court-ordered legislative reapportionment plans have been presented for consideration by the District Court, but no final judgment on a constitutionally valid permanent plan has yet been entered. The qualifying deadline for party candidates in the 1979 legislative primary elections is June 7, 1979. Miss. Code Ann. § 3121 (1956 Recomp.)

The District Court on August 2, 1977, directed the parties within 90 days to file new proposed court-ordered plans, and invited the Mississippi Legislature to file a plan of its own. Order of Aug. 2, 1977. In response to this order, and pursuant to further directives and proceedings, five proposed court-ordered reapportionment plans were filed by the private plaintiffs, the United States as plaintiff-intervenor, and the Mississippi Legislature. These plans are:

(a) Department of Justice precinct plan, based on voting precincts, filed October, 1977, revised February, 1978.

(b) Department of Justice Census enumeration district (ED) plan based on Census ED's, filed October, 1977.

(c) *Connor* plaintiffs' precinct plan, based on voting precincts, filed October, 1977, revised February, 1978, revised March, 1978.

(d) Mississippi Legislature's ED plan, based on Census ED's, filed October, 1977.

(e) Mississippi Legislature's precinct plan, based on voting precincts, filed March, 1978.

The trial was commenced on November 21 and 22, 1977, and concluded on February 14, 1978.

On May 3, 1978, Special Master W. D. Neal—appointed in 1975—filed a proposed court-ordered plan with the District Court, and filed additional alternatives and revisions on May 9 and 11. On May 15 the District Court ordered the Special Master to file a final plan, directed the parties and the Special Joint Legislative Committee on Reapportionment of the Mississippi Legislature to file any objections to the Special Master's proposal within 15 days. The Special Master's final plan was filed May 18, and the parties and the Joint Reapportionment Committee subsequently filed comments and objections. On June 30 the Special Master responded to the comments and objections of the parties, and filed revisions to his proposed final plan.

On June 12, noting that "the differences among the various parties . . . are so narrow that they could easily be resolved among the parties themselves," the court directed a settlement conference among the parties within 15 days "in which they are requested to explore every reasonable possibility for the entry of a consent decree requirements of court-ordered plans established by this
the earliest practicable date thereafter." 425 U.S. at 679.

. . ." Order of June 12, 1978. Pursuant to the District Court's June 12 order, counsel for all parties met for settlement negotiations during June, July, and August and worked out a settlement plan, which was then presented by counsel for the defendants to the Joint Reapportionment Committee of the Mississippi Legislature (the Legislature not being in session) for its approval. Meanwhile, at an informal conference with counsel for the parties on August 4, Circuit Judge J. P. Coleman set an August 20 deadline for these settlement negotiations, and indicated that if these negotiations failed, a plan of the court's own choosing would be ordered into effect.

Upon receipt of the settlement plan worked out by the parties in these negotiations, the Mississippi Legislature's Joint Reapportionment Committee took a poll of the members of the Legislature, and a majority of both houses of the Mississippi Legislature by a vote of 80 to 13 in the House and 26 to 7 in the Senate voted in favor of accepting the settlement plan as a court-ordered plan in the event that the Legislature's 1978 statutory plan did not meet approval under the Voting Rights Act. On August 16 the Joint Reapportionment Committee passed a resolution recommending that the defendants agree to the settlement plan. On September 5, however, negotiations on a proposed consent decree broke down, and the District Court was informed that although the parties had agreed on a statewide reapportionment plan for both houses of the Mississippi Legislature, they were unable to agree on the wording of a proposed consent decree.[2]

[2] The *Connor* settlement plan was based in large part on the 1978 statutory plan. Twenty districts in the House and ten in the Senate were realigned to meet the objections of plaintiffs and the United States to dilution of black voting strength. The drafting of a proposed consent decree was blocked when on September 5 attorneys for the State insisted that plaintiffs and the United States stipulate that the settlement plan could not be introduced in evidence in the § 5 declaratory judgment proceeding on the statutory plan in the District Court for the District of Columbia, and could not be used as a measure of whether the statutory plan was retrogressive of black voting strength. Because the statutory plan provided fewer majority black districts than the settlement plan, and was retrogressive as measured by the settlement plan, plaintiffs and the United States refused to agree to those proposed stipulations.

Having negotiated a settlement of *Connor* v. *Finch* which was acceptable to all the parties, except for the wording of a consent decree, officials for the State of Mississippi then chose to defeat these settlement efforts by pursuing their efforts to gain approval under § 5 of the Voting Rights Act of a separate, statutory plan which provides less protection for the voting rights of black citizens than the *Connor* settlement plan. After conclusion of the trial in *Connor*, the Mississippi Legislature enacted and the Governor signed on April 21, 1978, a new statutory reapportionment plan. Miss. Laws, 1978, chs. 515 and 535. This plan was submitted to the Attorney General pursuant to § 5 of the Voting Rights Act of 1965 on June 1. On July 31 the Attorney General determined that he was unable to conclude that the submitted plans for the Senate and House "do not have the purpose or effect of abridging the right to vote because of color," and lodged an objection to the statutory plan.[3] On August 1 the State filed an action in the District Court for the District of Columbia pursuant to § 5 of the Voting rights Act, *State of Mississippi* v. *United States*, Civil No. 78-1425, seeking a declaratory judgment that the statutory plan does not have the purpose or effect of abridging the right to vote on account of race or color. That action went to trial on September 18 through 27. Briefs were filed, and oral argument in that case presently is scheduled for January 16, 1979.[4]

[3] A copy of the § 5 objection letter is attached hereto as Appendix C.

[4] One of the *Connor* plaintiffs Henry J. Kirksey, and nine other black Mississippi voters intervened in that action and participated in the trial.

On August 3 the State official defendants in *Connor* v. *Finch* filed a motion for a stay requesting the District Court in *Connor* to withhold judgment on a permanent court-ordered plan until the § 5 lawsuit to gain approval of the statutory plan was concluded, and alleged in support of their motion: "Failure to grant the relief requested, on the other hand, may well have the effect of causing the Legislature's statutory plan . . . potentially subjected to a charge in a Section 5 proceeding that [it] is a retrogression from a plan imposed, or about to be imposed by this Court . . ." The *Connor* settlement plan provides 49 black population majority districts and 39 black voting age population majority districts, while the statutory plan provides only 46 black population majority districts and only 36 black voting age population majority districts. In addition, the Attorney General determined in his § 5 objection, and the Department of Justice and black voters who intervened in the § 5 declaratory judgment action presented evidence in the District Court for the District of Columbia, that the statutory plan fragments and dilutes black voting strength in a number of districts.

On October 12, 1978, plaintiffs in *Connor* v. *Finch* filed a motion for entry of judgment requesting the District Court to order into effect the *Connor* settlement plan worked out in the settlement negotiations across the summer, and approved by a majority of both houses of the Mississippi Legislature. In addition, on November 15 the plaintiffs filed a motion for special elections to fill three vacancies in the Mississippi Legislature and to hold special elections in seven additional black voting age population majority districts in the *Connor* settlement plan—in areas in which white voting majority multi-member districts were created in the temporary 1975 plan—prior to the convening of the 1979 session of the Legislature on January 2.

A hearing was held on these motions on November 29, at which Judge Coleman indicated without dissent from the other Judge present—District Judge Harold Cox—that the court did not intend to implement the settlement plan because it had not been agreed to in a consent decree by the defendants. Judge Coleman also indicated—without dissent from Judge Cox—that the District Court did not intend to promulgate a permanent court-ordered plan while the § 5 declaratory judgment proceedings on the statutory plan were continuing. Thus, in effect, the District Court has granted the stay requested by the *Connor* defendants, and has refused—despite the explicit directions of this Court that a new plan be promulgated "with a compelling awareness of the need for its expeditious accomplishment"—to order into effect a new court-ordered plan for the 1979 legislative elections.

When the 1979 regular session of the Mississippi Legislature convenes on January 2, there will be at least three vacancies in the Mississippi Legislature, and possibly more. One vacancy has existed since December 10, 1977, when Rep. George W. Rogers, Jr., of Warren County resigned to take a position with the Central Intelligence Agency in Washington. On December 12, 1977, the District Court issued a temporary restraining order—which is still in effect—restraining a special election to fill that vacancy under the temporary 1975 plan on findings, *inter alia*, that an evidentiary hearing on court-ordered plans had been scheduled and "this Court has indicated that it will make a decision in this matter, promptly, after the scheduled hearings are completed." Temporary Restraining Order of Dec. 12, 1978 (Appendix B, attached). Two other legislators have been elected to state court judgeship positions, and their terms of office will commence on January 1.

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF THE DISTRICT COURT TO RENDER A FINAL JUDGMENT ON A PERMANENT PLAN AMOUNTS TO A NULLIFICATION OF AND A FAILURE TO ENFORCE THIS COURT'S MANDATES IN CONNOR v. FINCH AND CONNOR v. COLEMAN.

More than thirteen years have passed since plaintiffs initiated this litigation seeking constitutional reapportionment of the Mississippi Legislature. This case already has been before this Court five times in this decade, and still plaintiffs have not obtained the relief to which they are entitled. Until the legislature is reapportioned consistently with the Fourteenth and Fifteenth Amendments, the people of Mississippi will continue to suffer irreparable injury to their rights as voters. To date, every effort to bring this litigation to a final judgment has been unsuccessful. The District Court after a year and half of proceedings on remand still has not entered a final judgment. This failure of the District Court to act promptly completely violates and nullifies this Court's mandate and direction that the District Court draw up a new plan "with a compelling awareness of the need for its expeditious accomplishment, so that the citizens of Mississippi at long last will be enabled to elect a legislature that properly represents them," *Connor* v. *Finch*, *supra*, 431 U.S. at 426. The mandate of this Court in *Connor* v. *Coleman*, 425 U.S. 675, 678 (1976) "to bring this case to trial forthwith . . . to the end of entering a final judgment . . . to be applicable to the election of legislators in the 1979 quadrennial elections, and also ordering any necessary special elections," reiterated in *Connor* v. *Finch*, *supra*, remains unfulfilled.

The District Court itself, in staying the special election to fill the George Rogers vacancy on December 12,

1977, stated its intention that after the conclusion of the February 14, 1978 hearing it would "make a decision on this matter, promptly." Thus, the District Court has not only violated the mandates of this Court, but it also has violated its own assurances to the parties.

This Court has held that reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt, *Connor* v. *Finch*, *supra*, 431 U.S. at 414-415; *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975). "[I]t is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise* v. *Lipscomb*, 46 U.S.L.W. 4777, 4779 (U.S. June 22, 1978, No. 77-529). In the eighteen years since the 1960 decennial census the Mississippi Legislature has availed itself of the opportunity to reapportion on five occasions, in 1962, 1971, 1973 and 1975. "[B]ut there is still no constitutionally permissible apportionment plan for the Mississippi Legislature," *Connor* v. *Finch*, *supra*, at 425. The Attorney General has lodged a § 5 objection to the 1978 legislative plan for dilution of black voting strength, and the State still has not yet obtained § 5 approval of its plan in the District Court for the District of Columbia. The qualifying deadline for candidates in the 1979 legislative elections is now less than six months away.

Thus, the "reasonable opportunity" available to the Mississippi Legislature has been exhausted with respect to the scheduled 1979 elections, and it has now become incumbent upon the District Court to formulate a final plan of its own. "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation,'

Connor v. *Finch*, *supra*, at 415, of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise*, *supra*, at 4779. The mere pendency of a § 5 declaratory judgment proceeding is no reason for the District Court to defer judgment. "Pending such submission and clearance, if a State's electoral processes are not to be completely frustrated, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans." *Wise* v. *Lipscomb*, *supra*, at 4779. The Mississippi Legislature's 1978 statutory reapportionment plan will not be effective as law until and unless cleared pursuant to § 5 of the Voting Rights Act. *Connor* v. *Waller*, *supra*. While the § 5 issue of the discriminatory purpose or effect of that statutory plan will be decided *de novo* by the District Court for the District of Columbia, it has nevertheless been recognized by that Court that the Attorney General's interpretation of Section 5 of the Voting Rights Act is "entitled to deference." *City of Petersburg, Virginia* v. *United States*, 354 F. Supp. 1021, 1031 (D.D.C. 1972) (three-judge court), *aff'd mem.*, 410 U.S. 962 (1973). Accordingly, the State of Mississippi has a heavy burden indeed. The defendants themselves recognized this in their motion for a stay of proceedings when they apparently conceded as a reason for the stay that their statutory plan provides less protection of the voting rights of black voters in Mississippi than the plans currently under consideration by the District Court in *Connor*.

The District Court has a duty to order into effect a new permanent plan now because (1) this Court has ordered it to, (2) a court-ordered plan is necessary to fill existing and anticipated vacancies in the Mississippi Legislature prior to the 1979 legislative elections, (3) the 1979 legislative elections are imminent, and (4) Mississippi has not yet obtained approval under § 5 of the Voting Rights Act of its statutory plan.

No harm can come to the defendants or the State of Mississippi if the District Court promulgates a court-ordered plan now, because a § 5-approved statutory plan automatically supersedes any court-ordered plan.

On the other hand, if the District Court is permitted to withhold final judgment, and the statutory plan is not approved in the § 5 declaratory judgment action, plaintiffs will suffer irreparable injury in that they will be effectively denied an appeal to this Court—because of time limitations—from whatever permanent plan the District Court in *Connor* orders. The § 5 declaratory judgment proceeding is likely to continue for several more months. Although that case has been tried, oral argument on the briefs has not been scheduled until January 16, 1979. A final judgment in that proceeding is expected shortly after that. But the State already has announced that if § 5 approval is denied by the District Court, it will appeal to this Court. If the D.C. District Court rules in favor of the State, it is likely that either the Department of Justice or the intervenors (one of whom is a *Connor* plaintiff) will appeal. In any event it is not likely that that proceeding will be concluded before June, 1979.

But even if the State succeeds in obtaining clearance of the statutory plan pursuant to § 5, under that section a §5 declaratory judgment does not "bar a subsequent action to enjoin enforcement" of the plan under either the Fourteenth or Fifteenth Amendments. 42 U.S.C. § 1973c. Since the population deviations in the statutory plan for both houses of the Mississippi Legislature exceed the 10% limit of prima facie constitutionality established by this Court in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), and *White* v. *Regester*, 412 U.S. 755 (1973), and are greater than any of the plans filed with the District Court in *Connor*, it is likely that further litigation on the statutory plan would ensue.

Twice in this decade appellate review of the court-ordered plans for 1971 and 1975 has been frustrated by the fact that the District Court failed to order final plans, and—in 1975—that the District Court's plan was promulgated so close to the August legislative primary elections as to preclude appellate review. The District Court's plan for the 1979 legislative elections must be ordered into effect immediately so that the appellate rights of any aggrieved party will not be cut off. Any further delay will grievously and irreparably jeopardize the chances that a constitutional legislative reapportionment plan will be approved by this Court in time for the 1979 legislative elections.

II. THIS COURT HAS JURISDICTION TO GRANT THE RELIEF REQUESTED.

This Court has full jurisdiction, by mandamus, to issue whatever orders are necessary to effectuate its prior judgments:

> "When a lower federal court refuses to give effect to, or misconstrues, our mandate, its action may be controlled by this court, either upon a new appeal or by a writ of mandamus, *Re Potts*, 166 U.S. 263, 265; *Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, and cases cited. It is well understood that this Court has power to do all that is necessary to give effect to its judgments." *Baltimore & Ohio R. Co.* v. *United States*, 279 U.S. 781, 785 (1929); accord, *United States* v. *Haley*, 371 U.S. 18 (1962).

Further, this Court consistently has reaffirmed its power, by mandamus, to compel a lower court to decide a pending case when it has a duty to do so:

> "A 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal court has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943); *Ex parte Peru*, 318 U.S. 578, 584 (1943); *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382 (1953). 'Repeated decisions of this Court have established the rule . . . that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause,' *Insurance Co.* v. *Comstock*, 16 Wall. 258, 270 (1873), or to require 'a Federal court of inferior jurisdiction to reinstate a case, and to proceed to try and adjudicate the same.' *McClellan* v. *Carland*, 217 U.S. at 280." *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 352 (1976).

Issuance of the extraordinary writ here is required because of the extraordinary delay of the District Court in promulgating a permanent court-ordered plan which meets constitutional requirements. Four times in this decade, in *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); and more recently in *Connor* v. *Finch*, 431 U.S. 407 (1977), this Court has directed the District Court to enter a permanent plan which satisfies the Constitution and the prior decisions of this Court, but still there is no legally adequate District Court reapportionment plan for Mississippi. The command of *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964), that "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan" remains unfulfilled.

Petitioners have no other adequate remedy. Petitioners repeatedly have requested the District Court to enter a

permanent plan, but no response has been forthcoming. By refusing to enter a permanent plan, and by inaction in effect granting the defendants' motion for a stay of judgment, the District Court has defeated petitioners' right of appeal from a final judgment of the District Court provided by 28 U.S.C. § 1253. Jurisidiction to issue the writ lies in this Court, which is the court with direct appellate jurisdiction over any final judgment the District Court may enter. *United States* v. *United States District Court*, 334 U.S. 258, 263-64 (1948); *Ex parte United States*, 287 U.S. 241, 248-49 (1932); *In re Washington & G. R. Co.*, 140 U.S. 91 (1891).

CONCLUSION

On May 31, 1977, this Court directed the District Court to act expeditiously in devising a new permanent court-ordered reapportionment plan which meets constitutional requirements. A year and a half of proceedings on remand, which included the filing of at least seven proposed plans with the District Court, have not yet resulted in a final judgment embodying a permanent court-ordered plan. Time now is of the essence. The qualifying deadline for the 1979 quadrennial legislative elections is now less than six months away.

Under these circumstances, the mere pendency of § 5 declaratory judgment proceedings in the District Court for the District of Columbia seeking approval of the new statutory plan does not justify any further delay in the District Court's entry of a final judgment because (1) if the District Court for the District of Columbia denies approval of the statutory plan, and that judgment is affirmed on appeal, then—because of time restraints—petitioners will be denied their right of appeal from whatever plan the Mississippi District Court orders into effect for the 1979 legislative elections, and (2) even if the District Court for the District of Columbia

approves the statutory plan, this will not end the litigation on the statutory plan, because defendants and the intervenors in that case will have a right to appeal that decision, and Mississippi voters will have a right to file a separate action challenging the constitutionality of the statutory plan on Fourteenth Amendment grounds.

PRAYER FOR RELIEF

For the foregoing reasons, and on the basis of the authorities cited, petitioners pray that a writ of mandamus issue to Honorable J. P. Coleman, United States Circuit Judge, Honorable Dan M. Russell, Jr., United States District Judge, Honorable Harold Cox, United States District Judge, and to the United States District Court for the Southern District of Mississippi, directing them within 30 days to enter a final judgment embodying a permanent court-ordered reapportionment plan for the Mississippi Legislature for the 1979 legislative elections that complies with this Court's prior decisions in *Connor* v. *Finch*, 431 U.S. 407 (1977), and *Connor* v. *Waller*, 421 U.S. 656 (1975).

Respectfully submitted,

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Appendices

APPENDIX A

DOCKET ENTRIES OF DISTRICT COURT PROCEEDINGS SINCE MAY 31, 1977

DATE	PROCEEDINGS
6- 6-77	SLIP OPINION OF SUPREME COURT OF THE UNITED STATES: Reversed and remanded. The judgment or mandate will issue after expiration of 25 days from date of opinion (5-31-77) unless a timely petition for rehearing is filed, filed. (Copies mailed Judges Coleman, Russell & Cox and copy mailed Mr. William D. Neal).
7-28-77	CERTIFIED COPY OF JUDGMENT OF SUPREME COURT OF THE UNITED STATES: The judgment of USDC in these causes is hereby reversed with costs and remanded to USDC for S/D of Miss. for further proceedings in conformity with the opinion of this Court, further ordered that the United States recover from Cliff Finch, Governor of Mississippi, et al $17,563.00 and Peggy J. Connor et al in Nos. 76-777 and 76-935 recover from Cliff Finch, Governor of Mississippi, et al $300 for their costs herein expended, filed and entered OB 1977, pages 1673-1674. (Copies mailed Judges Coleman & Russell and handed Glenda for Judge Cox and copy mailed Mr. William D. Neal).
7-28-77	*JS 5 CARD.*
08-02-77	ORDER: Attys. of record to file motions no later than 08/20/77; Dept. of Justice and private pltfs. directed to file within 90 days or sooner, a complete plan for redistricting Miss. St. Senate and House agreeably to standards of Supreme Court; Clerk of Court to forward copy of this order to the Governor, Lt. Governor and Speaker of House; As soon as practicable, the Court will hear evidence on fees and expenses allowed its special masters and attys;

DATE	PROCEEDINGS
	The Dept. of Justice will file three copies thereof with the Clerk of this Court for use of the Judges, the printed record; Deadlines herein imposed will in no respect be extended, filed and entered OB 1977, pages 1689-1691. (Copies handed all attys. of record; copy handed Glenda for Judge Cox and mailed Judge Russell; Copies handed office of the Governor, Lt. Governor and House of Representatives; Copies handed Senator's offices and all press.)
08-11-77	Supplemental motion of pltfs. for an award of attorney's fees, with Affidavit of Frank R. Parker and cert. of service, filed. (Copy mailed Judges Russell and Coleman and placed in Glenda's box for Judge Cox.)
08-19-77	Motion of defts. Cliff Finch, Gov. of Miss., et al to stay execution of mandate as to taxation of costs, with cert. of service, filed. (Copy handed Glenda and Gwen for Judges Russell and Cox mailed JUDGE Coleman.)
08-22-77	Motion of the United States for entry of order requiring Special Master to file detailed explanation of plan and for order establishing a schedule, with notice of motion on 09/02/77 at 9:00 AM in Jackson and cert. of service, filed (Copies placed in Glenda and Gwen's. boxes and mailed Judge Coleman)
08-22-77	Pltf's. amended motion for an award of attorney's fees, with cert. of service and indefinite notice of motion, filed. (Copies placed in Glenda and Gwen's boxes and mailed Judge Coleman.)
8-24-77	ORDER: Stay of mandate of the Supreme Court as to taxation of costs pending on application to the Supreme Court is granted upon condition that motion be filed in the Supreme Court not later than 9-10-77, with copies thereof filed in this Court,

DATE	PROCEEDINGS
	filed and entered OB 1977, pages 1881-1882. (Copies handed all local attys. and mailed Mr. Jones & Johnson, Dept. of Justice; copy handed Glenda for Judge Cox and handed Gwen for Judge Russell; copies handed office of the Governor, Lt. Gov., House of Representatives and all Senators' offices and notified all press).
8-24-77	ORDER: The Court has already directed Dept. of Justice and private pltfs. to file a plan within 90 days and it is indicated that State of Miss. may file one within same period. If any of these three plans prove acceptable to the Court it will not be necessary for the Special Master to file a new plan, so action on the Motion of the United States for entry of order requiring Special Master to file detailed explanation of plan and for establishing a schedule will be deferred pending developments. Should the Special Master be called upon to file a plan, the motion of the United States will at that time be granted; upon filing of plans herein referred to, the Court will adopt a schedule for further proceedings in which determination of this litigation will be expedited to the limit; the Clerk of this Court will provide a copy of this order to counsel of record, filed and entered OB 1977, pages 1883-1884. (Copies handed all local attys. and mailed Mr. Jones & Johnson, Dept. of Justice; copy handed Glenda for Judge Cox and handed Gwen for Judge Russell; copies handed office of the Governor, Lt. Gov., House of Representatives and all Senators' offices and notified all press).
9- 9-77	Notice of United States of filing of record, with cert, of service, filed.
9- 9-77	Received from United States three copies of Volumes I, II and III of the Appendix that was printed at the request of the United States, as directed in

DATE	PROCEEDINGS
	paragraph six of Order of this Court dated 8-1-77, which directed that these copies be filed with the Clerk of this Court for the use of the Judges in the further consideration of this case. U.S. requests that at conclusion of this litigation it be permitted to withdraw at least one of the copies. (The three Volumes mailed to Judges Coleman and Russell and handed Glenda for Judge Cox, together with copy of Notice of filing of record).
09-12-77	Submission of deft's. motion to retax costs pursuant to order of 08/23/77, with cert. of service, filed. (Copy mailed Judge Coleman, mailed Judge Coleman, mailed Gwen for Judge Russell and placed in Glenda's box for Judge Cox.)
10-29-77	Submission of PLANS for the APPORTIONMENT of The Legislature of the State of Mississippi, with cert. of service and attachments, filed. (Copies mailed Judges Coleman & Russell & placed in Glenda's box for Judge Cox.)
10-29-77	Map in support of Plans of The Legislature of the State of Mississippi—House of Representatives-State of Mississippi, filed.
10-29-77	Map in support of Plans of the Legislature of the State of Mississippi—SENATE—State of Mississippi, filed.
10 31-77	*MAPS PLACED IN vault.*
10-31-77	PLANS submitted by the United States pursuant to Order of 8-1-77, with Attachments A thru N, incl., and cert. of service, filed.
10-31-77	Maps in support of Plans by United States, being Attachment O, filed. (Copies of Plans mailed Judges Coleman & Russell & placed in Glenda's box for Judge Cox—Maps held in Clerk's office pending their request).
10-31-77	MAPS PLACED IN VAULT.

DATE	PROCEEDINGS
10-31-77	Submission of Data in support of Plans for the apportionmnet of the Legislature of the State of Mississippi, with cert. of service and attachments, filed. (Copies mailed Judges Coleman & Russell & placed in Glenda's box for Judge Cox).
10-31-77	Pltfs'. submission of MISSISSIPPI LEGISLATIVE REAPPORTIONMENT PLANS, with cert. of service and Attachments, filed. (Mr. Frank Parker stated that he mailed the three Judges their copies).
11-03-77	ORDER. State will be required to justify use of census enumeration districts in its plan rather than precincts without disrupting local elections in 1979. Proposed plans will be evaluated in the light of the guidelines previously stated by this Court and by the Supreme Court. Special Master, W. D. Neal, shall proceed to a comparison and evaluation of all plans filed. He may, is so advised, promptly file a plan of his own composition without delaying litigation and be prepared to testify as to pertinent aspects of all presented plans. Counsel will be further notified that as the forthcoming hearings the Court intends to explore all pending issues. Notice to counsel may be accomplished by mailing a true copy of this Order at his appropriate address, filed and entered OB 1977, pages 2450-2452. (Certified copies mailed all attys. of record, Judge Coleman, Mr. Neal; Handed Jennie for Judge Russell and placed in Glenda's box for Judge Cox.)
11- 8-77	ORDER: Clerk of Court is ordered to notify all counsel of record that the Court is hereby setting this matter for hearing on Monday, Nov. 21, 1977, at 9:30 AM, in fourth-floor courtroom, U.S. Courthouse & Post Office Building, Jackson, Miss. In addition to instructions contained in this Court's Order of 11/02/77, the Court will hear evidence on

DATE	PROCEEDINGS
	various plans submitted in the following order; First; On behalf of the private pltfs.; Second: On behalf of the Department of Justice; Third: On behalf of the defts; and Fourth: on behalf of the Legislative plans, filed and entered OB 1977, page 2464. (Copies mailed attys. of record and Mr. William D. Neal.)
11- 8-77	Motion of John Haynes and Prentiss County, Miss. to Intervene as pltfs., with notice of Motion on 11-21-77, at 9:30 A.M., in Jackson, before Judges James P. Coleman, Harold Cox and Dan M. Russell, and cert. of service with copy of Complaint of Intervenors attached as Exhibit "A" thereto, filed.
11-10-77	Pltf's. notice of deposition of State Rep. Thomas H. Campbell, III on 11/14/77, with cert. of service, filed. (Copies handed Judge Russell and Glenda for Judge Cox and mailed Judge Coleman on 11-11-77).
11-10-77	Submission of additional data in support of Plans for the Apportionment of the Legislature of the State of Mississippi, with cert. of service, filed.
11-10-77	SENATE PLAN MAPS as additional data in support of plans for apportionment, filed. (MAPS PLACED IN VAULT)
11-10-77	HOUSE PLAN MAPS as additional data in support of plans for apportionment, filed. (MAPS PLACED IN VAULT.)
11-11-77	Motion of defts. for stay of the taking of deposition of State Representative Thomas H. Campbell, III, with cert. of service, filed.
11-11-77	Pltf's. notice of deposition of Senator Jim Noblin on 11/15/77, with cert. of service, filed.

DATE	PROCEEDINGS
11-12-77	ORDER: Consideration of and action upon the Government's proposals shall be the first order of business in the hearing schedules for 11/21/77; Taking of all depositions noticed before 11/21/77 shall be stayed pending this hearing; Defts. are requested as soon as convenient to file formal stipulations setting forth basis for population figures and population for each precinct named in House or Senate, filed and entered OB 1977, pages 2500-2502. (Copies mailed all attys. of record, Judges Coleman and Russell. Copy placed in Glenda's box on Monday 11/14/77.)
11-14-77	Return of Columbus Keepler on deposition subpoena duces tecum showing execution as to Jim Noblin, filed.
11-15-77	Plaintiffs' Motion to Vacate Order Staying Discovery, with Certificate of Service and Notice of hearing on 11-21-77, filed. Copies transmitted to Judges.
11-15-77	Plaintiffs' Opposition to Motion to Intervene of John Haynes and Prentiss County, with Certificate of Service, filed. Copies transmitted to Judges.
11-15-77	Plaintiffs' Motion to Compel Defendants to Furnish Plaintiffs with Maps and Copies of all Pleadings and Exhibits, with Certificate of Service and Notice of hearing. Copies transmitted to Judges.
11-16-77	Notice of Thomas J. Ginger of appearance as co-counsel for plaintiff, with Certificate of Service, filed.
11-18-77	Corrections to House Plan A/C as originally submitted to the Federal Court, with Certificate of Service, filed. Copies transmitted Judges.

DATE	PROCEEDINGS
11-21-77	MEMORANDUM of the United States in response to the motion of John Haynes and Prentiss County for leave to intervene, filed. (Copies handed Gwen for Judges. Russell and handed Glenda for Judge Cox and Judges Coleman. Filed at direction of B. Price.)
11-21-77	Corrections to pltfs'. precinct plan, House of Representatives, with cert. of service, filed. (Copy handed Gwen for Judge Russell and handed Glenda for Judges Cox and Coleman.)
11-21-77	Defts'. motion to quash subpoena duces tecum, with copy of subpoena attached and notice of motion on 11-21-77, at 9:30 A.M., in Jackson, before the Three-Judge Court, filed. (Copies handed Glenda for the three Judges).
11-21-77	Memorandum of United States in response to Courts' Nov. 11, 1977 Order, with attachments, filed. (Copies handed Glenda for the three Judges). (Filed at direction of Glenda per instructions in Courtroom).
11-21-77	Statement of Stewart Vail—lodged at the direction of Judge Harold Cox.
11-21-77	Statement of Hoyt T. Holland, Jr., Special Master dated 8-1-75 in the amount of $935.29, filed.
11-21-77	Statement of Hoyt T. Holland, Jr., Associate Special Master dated 10-14-76 in the amount of $4863.15, filed.
11-21-77	EXHIBITS: P-1 through P-12, D-1 and D-2, filed. Exhibits P-6, P-7, P-10 and P-12 in vault.
11-28-77	Pltf's. motion for preliminary injunction against special election, or alternatively, for special election relief, with cert. of service, Exhibit A and notice of motion to be set by Court, filed.

DATE	PROCEEDINGS
11-29-77	ORDER ON DISCOVERY: Schedule established for discovery on proposed court-ordered legislative reapportionment plans filed with the Court as set out; Private pltfs. may take deposition of Rep. Thomas H. Campbell III but may not be taken until after current Special Session of Miss. Legislature has adjourned, and further private pltfs. shall be limited in their depositions of Circuit Clerks to depositions of 5 Circuit Clerks of State of Miss.; Hearing in this action shall reconvene on Tuesday, 2-14-78, at 9:00 A.M., filed and entered OB 1977, pages 2618-2619. (Copies handed US Atty. and Frank Parker and mailed other attys. of record.)
11-29-77	ORDER: Defts. having informed the Court that they would furnish pltfs. with copies of maps attached to their Submission of Additional Data by Monday, 11-28-77, it is therefore Ordered that pltfs'. motion to compel defts. to furnish pltfs. with exhibits be, and is hereby denied, filed and entered OB 1977, page 2620. (Copies handed US Atty. and Frank Parker and mailed other attys. of record.)
11-29-77	ORDER: Motion for leave to intervene filed by John Haynes and Prentiss County, Miss. is hereby granted for limited purpose of permitting these intervenors to oppose the proposed court-ordered reapportionment plan submitted by the Miss. Legislature as it affects Prentiss County, Miss. and movants are hereby granted leave of Court to file their proposed complaint in intervention attached to their motion for this limited purpose, filed and entered OB 1977, page 2621. (Copies handed US Atty. and Frank Parker and mailed other attys. of record.)
12- 2-77	Pltf's. motion for Temporary Restraining Order, with cert. of service and notice of motion on 12-6-77, at 10:00 A.M., in Gulfport, before Judge Russell, filed. (Copy mailed Gwen for Judge Russell.)

DATE	PROCEEDINGS
12- 2-77	Pltfs. submission of precinct data, with cert. of service and precinct statistics attached, filed. (Copy mailed Gwen for Judge Russell.)
12- 5-77	Copies of the above two pleadings handed Glenda for Judge Cox and mailed Judge Coleman and Mr. Neal.
12-07-77	SUPPLEMENTARY MEMORANDUM OF THE UNITED STATES in response to the Court's. 11-11-77 Order, with attachments A-F and cert. of service, filed. (Copies mailed Judges Russell & Coleman and placed in Glenda's box for Judge Cox. Copy mailed Mr. Neal.)
12-06-77	DEPUTY CLERK SHEET: Hearing in Gulfport on 12-06-77 before Judge Russell for 1 hr. and 15 min. on motion for TRO. ACTION TAKEN: Granted, to remain in effect until Three-Judge Panel can hear motion for preliminary injunction—order to be submitted, filed.
12-06-77	EXHIBITS TO MOTION FOR TRO: P-1 thru P-7, filed.
12- 9-77	Reporter's Transcript of Proceedings held in Jackson on 11-21 & 22-77, before Judges Coleman, Russell and Cox (Volumes I and II), filed. (Copies mailed Judges Coleman and Russell—Judge Cox stated that he did not want a copy, per David Scott.)
12-12-77	TEMOORARY (SIC) RESTRAINING ORDER: Finch, et al restrained until determination by Three Judge Court from issuing any writ of election or authorizing special election to fill vacancy in House of Representatives created by resignation of George W. Rogers, Jr. in Warren and Claiborne Counties, filed and entered OB 1977, pages 2704-2705. (Copies mailed attys. of record and Judges Coleman & Russell and placed in Glenda's box for Judge Cox.)

DATE	PROCEEDINGS
12-20-77	ORDER: Clerk of this Court issue his check in the amount of $500.00 payable to the Lawyers' Committee for Civil Rights Under Law, being refund of the amount of the cash bonds for costs on appeal, filed and entered OB 1977, page 2783.
1-27-78	Deposition of Travis Cox taken by Stipulation on 12-19-77, filed.
1-31-78	Deposition of Thomas H. Campbell taken by pltf. on Dec. 12 & 13, 1977, filed.
1-31-78	Exhibits 1 thru 16 to deposition of Tommy Campbell, filed.
1-31-78	Exhibits 17 thru 29 to deposition of Tommy Campbell, filed.
2- 7-78	Deposition of Thomas Hofeller, signed by Mr. Hofeller, taken by defts. on 1-10-78, with deponent's corrections sheet marked as Court Reporter's Exhibit #1 and attached to back, filed.
2- 7-78	Exhibits 1 thru 10 to deposition of Thomas Hofeller (Separate Volume), filed.
2- 7-78	Deposition of Lucy Carpenter taken by pltfs. on 12-19-77 (per Court Reporter's letter attached to back), with Exhibits one, two & three attached, filed.
2- 7-78	Deposition of T. E. Jack Wiggins taken by pltfs. on 12-19-77, with Exhibits one thru seven attached, filed.
2- 7-78	Deposition of Calvin A. Webb taken by defts. on 1-9-78, with deponent's corrections sheet marked as Court Reporter's Exhibit #1 attached, filed.
2- 7-78	One Volume Exhibits to the deposition of Calvin A. Webb, filed.

DATE	PROCEEDINGS
2- 8-78	Submission by the United States of a substitute precinct plan, with cert. of service and Attachments A thru F, filed. (Copies mailed Judge Coleman and placed in Gwen and Glenda's boxes for Judges Russell and Cox.)
2- 9-78	Notice of hearing mailed attys. of record, three judges and handed all three Courtroom deputies for Feb. 14, 1978.
2-10-78	Deposition of Earl F. Fortenberry taken by defts. on Jan. 4 & 5, 1978, filed.
2-10-78	Exhibits to deposition of Earl Fortenberry No. 37 thru 48 and Nos. 58-59, filed.
2-10-78	Deposition of Dr. Delmer D. Dunn taken by defts. on 1-6-78, filed.
2-13-78	Deposition of Dr. Richard Morrill taken by pltfs. on 1-13-78, filed.
2-13-78	Notice of pltf. of filing of certified copies of Resolution of the Board of Supervisors of Franklin County, Miss., the Resolution of the Mayor and Board of Aldermen of Meadville, Miss. and the Resolution of the Mayor and Board of Alderman of Bude, Miss., original and three copies, with cert. of service, filed. (Copies handed Glenda for all three judges.)
2-14-78	Pltfs'. REVISED PRECINCT PLAN for the Mississippi Senate and House of Representatives, filed in Court Room and copies handed three Judges.
2-15-78	EXHIBITS: P-13 through P-21; G-1 through G-8; D-3 through D-15, filed. * P-16(A) (B) (C)—Depositions of Travis Cox, T. E. Wiggins and Lucy Carpenter. D-4, D-5, D-6, D-7, D-8 & D-8(a)—Depositions of Thomas Campbell, Dr. Delmer D. Dunn, Earl F. Fortenberry, Calvin A. Webb and Dr. Richard Morrill and Thomas Hofeller, filed with Exhibits.

DATE	PROCEEDINGS
2-21-78	Copy of letter from Mr. William D. Neal, Special Master, to Frank R. Parker with reference to mathematical errors in Pltf's. Revised Precinct Plan for the Miss. Senate and House of Representatives shown after analysis made, and recapitulation, or summary, of errors set out, with attachments, filed. (Orig. letter with attach. mailed Frank Parker, copies handed Judges Russell and Cox, mailed Judge Coleman, Gerald W. Jones, Civil Rights Div., Dept. of Justice and two copies mailed Atty. Gen. A. F. Summer, at direction of Mr. Neal).
2-28-78	Exhibits filed on 11-10-77, 11-22-77, 12-6-77 and 2-15-78 placed in Fourth Floor Courtroom in anteroom by stairwell.
3- 7-78	Index of pleadings and submissions of defendants and the Special Joint Legislative Committee on Reapportionment compiled as follows: 1. Submission of Plans and Accompanying Data for the Apportionment of the Legislature of the State of Mississippi; 2. Memorandum of Legislature's Methodology; 3. Defendants' Submissions of the Summaries of the Trial Depositions of (A) Chairman Thomas Campbell, (B) Earl Fortenberry, (C) Dr. Delmer Dunn, (D) Thomas Hofeller, (E) Calvin Webb, and (F) Richard Morrill; 4. Defendants' Data Analysis of the Plaintiffs' and Plaintiff-Intervenor's Precinct Plans; 5. Submission of Election Returns in Seven Specified Elections; and 6. Defendants' Submission of Affidavit of Dr. Richard Morrill, each pleading having cert. of service and attachments, filed. (Copy mailed Judge Coleman and handed Gwen and Glenda for Judges Russell & Cox.)
3-15-78	Letter from A. F. Summer dated 3-15-78 to Clerk of Court with attached Certified House Concurrent Resolution No. 116, Laws of Mississippi of 1978,

DATE	PROCEEDINGS
	with request to substitute in pleading filed on 3-7-78 in lieu of Resolution filed with Index of pleadings, etc. on that date. (Certified copy of House Concurrent Resolution No. 116, Laws of Mississippi of 1978 substituted per request. (Per Mr. Thomas Karol two maps placed on Board in file.) (Copies of Letter and copy of Resolution mailed to Judge Russell and Judge Coleman and placed in Glenda's box for Judge Cox.)
3-22-78	Pltfs'. second revised proposed Court-ordered precinct plan for The Mississippi Legislature, with cert. of service, filed. (Copies mailed Mr. Neal, Judges Coleman and Russell and placed in Judge Cox's box.)
3-28-78	Pltf's. motion to strike improper pleadings and papers, with cert. of service and notice of motion at discretion of the Court, filed. (Copies mailed Judges Coleman and Russell and placed in Glenda's box for Judge Cox.)
4-10-78	Response of the United States to pltfs'. motion to strike, with cert. of service, filed. (Copies mailed Judges Russell & Coleman and placed in Glenda's box for Judge Cox.)
4-10-78	Deft's. objection to pltfs'. motion to strike improper pleadings and papers, with cert. of service, filed. (Copy mailed to Judge Coleman and placed in Gwen & Glenda's boxes for Judges Russell and Cox.)
4-20-78	Court Reporter's Transcript of Proceedings held in Jackson, on 2-14-78, before Judges J. P. Coleman, Dan M. Russell, and Harold Cox, (1 Vol.), filed.
4-24-78	Defts. response to pltfs'. second revised proposed Court-ordered precinct plan, with cert. of service, filed. (Copy handed Glenda for Judge Cox and mailed to Judge Coleman, Judge Russell and Mr. Neal.)

DATE	PROCEEDINGS
5- 3-78	PLAN for the reapportionment of The Mississippi State Senate prepared by Special Master Under Direction of the Court, filed. (Copies mailed attys. of record, mailed Judge Coleman and handed Gwen for Judge Russell and handed Glenda for Judge Cox.)
5- 9-78	Special Master's suggested alternate for certain districts in his PLAN for reapportionment of Mississippi state senate, filed. (Copy handed Mr. Neal, handed Gwen for Judge Russell, Put in Gwen's box for Judge Cox, mailed Judge Coleman and all attys. of record.)
5-11-78	Special Master's submission of Revised Plans for the Redistricting of State Senate and House of Representatives Districts affecting Forrest County; and an alternate Plan for House of Representatives Districts affecting Warren County, filed. (Copies mailed attys. of record and Judge Coleman, handed Mr. Neal, and Gwen for Judge Russell, placed in Gwen's Box for Judge Cox.)
5-15-78	ORDER: Special Master shall file a final proposal incorporating his plan in final form to include amendments; Within 15 days after Special Master shall have complied with this Order, all parties shall file written objections to said plan. The Mississippi Legislature not being in session, the appropriate committee is invited to file objections if it has any, filed and entered OB 1978, pages 1209-1210. (Copies mailed all attys. of record, Mr. Neal and Judge Coleman. Copies placed in Gwen's and Glenda's boxes for Judge Russell and Cox.)
5-18-78	Final Plan for the reapportionment of the Mississippi Legislature prepared by Special Master per Court Order of 5-15-78, filed. (Copy handed Mr. Neal and copies mailed to all attys. of record and Judge Coleman and handed to Gwen for Judge Russell and to Glenda for Judge Cox.)

DATE	PROCEEDINGS
5-19-78	Comments by the United States on the plans filed by the Special Master, with Attachments I and II and cert. of service, filed. (Copy handed Gwen for Judge Russell, Glenda for Judge Cox and mailed Judge Coleman.)
6- 7-78	Pltfs'. Objections to Special Master's Proposed Court-Ordered Plan for Reapportionment of the Mississippi Legislature, with cert. of service and Exhibits A and B, with Map attached, filed. (Copy handed Gwen for Judge Russell, Glenda for Judge Cox and mailed Judge Coleman—Mr. Parker mailed copy to Mr. Neal per cert. of service.)
6- 2-78	Objection of defts. and Special Joint Legislative Committee on Reapportionment to Special Master's Final Plan of Reapportionment, with cert. of service and with Appendix A and B attached, filed. (Copies mailed Judge Coleman and Mr. Neal and placed in Gwen's box for Judge Russell and Glenda's box for Judge Cox.)
6- 5-78	Comments by the United States on the Special Master's Final Plan, with Attachments I, II, & III and cert. of service, filed. (Copies mailed Judge Coleman and Mr. Neal and placed in Gwen's box for Judge Russell and Glenda's box for Judge Cox.)
6- 7-78	Errata to defts'. and the Spec. Joint Legislative Comm. on Reapportionment's objections to Special Master's Reapportionment Plan, with cert. of service, filed. (Copies mailed Judge Coleman and Mr. Neal and placed in Owen's box for Judge Russell and Glenda's box for Judge Cox.)
6-12-78	ORDER: Parties requested to meet in a settlement conference within 15 days of entry of this order, in which they are requested to explore every reasonable possibility for entry of consent decree, terminating this litigation except for such items as fixing

DATE	PROCEEDINGS
	appropriate attorneys' fees, compensation for Special Master, and the like. Court requests atty. for pltfs. to coordinate time and place for such meeting among various counsel and also designates atty. for pltfs. to report to the Court, in writing, whether an agreement has been reached, filed and entered OB 1978, pages 1415-1417. (Copies handed Frank Parker, U.S. Atty., Giles Bryant and Mr. Neal; copies placed in Gwen's box for Judge Russell and in Glenda's box for Judge Cox and mailed Judge Coleman and other attys. of record.)
6-30-78	Submission of Data by Special Master to Parties involved in settlement conference, filed. (orig. and 8 copies)
6-30-78	Answer of Special Master to objections made to and comments upon his "Final" Plan of Reapportionment of the Miss. Legislature and his Suggestions and Recommendations thereon, filed. (Orig. and 8 copies)
6-30-78	Copy of Submission of Data and Answer of Special Master mailed attorneys. Judges were submitted copies by Mr. Neal.
7-12-78	Court Reporter's Notes on hearings 6-15-76, 11-21, 22-77, & 2-14-78, filed in Jackson Division, in the office of David Scott.
8- 2-78	Defts'. motion to withhold announcement of Judgment pending Resolution of Proceedings under Section 5 of the Voting Rights Act of 1965, with cert. of service and notice of motion on 8-14-78, at 10:00 A.M., in Jackson, before The Three-Judge Court, with cert. of service; Affidavit of William A. Allain; List of Appendices 1 thru 10, incl. and Affidavit of Jerris Leonard, Esquire, filed. (Copies mailed Judges Coleman and Russell, placed in Glenda's box for Judge Cox and mailed Mr. Neal.)

DATE	PROCEEDINGS
8- 3-78	Letter from Giles W. Bryant, Spec. Asst. Attorney General to Clerk of Court, dated 8-3-78, with letter attached, which should have been attached to affidavit of Jerris Leonard, which was attached to Motion to Withhold Announcement of Judgment filed 8-2-78, in support of said motion, this copy of letter being inadvertently separated during xeroxing process, filed. (Copy of said letter attached to Affidavit of Jerris Leonard as requested.) (Copies mailed Judges Coleman and Russell, placed in Glenda's box for Judge Cox and mailed Mr. Neal.)
8- 4-78	Copy of letter from Frank Parker to Three Judge Court as follow-up to his letter of 7-27-78, reporting to Court re: settlement discussions, with Exhibits A, B & C attached, filed.
8-21-78	USA, pltf.-Intervenor's response in opposition to defts'. motion to withhold announcement of Judgment, with cert. of service, filed. (Copies mailed Judge Coleman, Gwen for Judge Russell and Mr. Neal and placed in Glenda's box for Judge Cox.)
9-22-78	Motion of Davis Hall Smith, atty. of record for the City of Jackson, Miss. to withdraw as attorney of record, with cert. of service and notice of motion on 10-5-78, at 9:00 A.M., in Jackson, before Mag. Countiss (per letter), filed.
10- 5-78	ORDER allowing Davis Hall Smith to withdraw as counsel of record for The City of Jackson, Mississippi, and is effective this date, filed and entered OB 1978, page 2658. (Copy handed Mr. Smith and mailed other attys. of record).
10-12-78	Pltfs'. Motion for Entry of Judgment, with notice of motion at time, place and date to be determined by the Court and cert. of service, with proposed final judgment attached thereto, filed. (Mr. Parker stated that he was handing Judges Russell and Cox copies and mailing Judge Coleman).

DATE	PROCEEDINGS
11- 6-78	Letter from Hon. J. P. Coleman, U.S. Circuit Judge, to Clerk of Court, dated 11-3-78, directing Clerk to notify all counsel in this case that after the elections next Tuesday they are requested to promptly inform the Court of the number and location of legislative vacancies in the State in order that they may then proceed to act on the motion for entry of judgment, filed.
11- 6-78	All counsel of record notified by mailing Notice, with copy of letter from Hon. J. P. Coleman attached, requesting that after the elections next Tuesday to promptly inform the Court of the number and location of legislative vacancies in the State in order that the Court may then proceed to act on the motion for entry of judgment, a copy of which is placed in back of file. (Copies also mailed Mr. Neal and Judges Coleman and Russell and placed in Glenda's box for Judge Cox.)
11- 9-78	Submission of statements for services and expenses of William D. Neal, Special Master, with statements attached, filed.
11-13-78	Pltfs'. Motion for special election relief, with Exhibit A attached and cert. of service, with notice of motion at a time and place at the discretion of the Court, filed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3830(A)

[Filed Dec. 12, 1977]

PEGGY J. CONNOR, *et al.*,
Plaintiffs,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

—VS—

CLIFF FINCH, *et al.*,
Defendants.

TEMPORARY RESTRAINING ORDER

Plaintiffs having filed a motion for temporary restraining order to restrain and enjoin the holding of a special election in House District 30 described by this Court's temporary 1975 plan, and the parties having been given notice of the hearing on the motion, and the Court having held a hearing on the motion on December 6, 1977 at which counsel for the plaintiffs and defendants appeared and presented arguments on the motion, and the Court having considered the arguments of counsel and the evidence presented, and being fully advised in the premises, finding that a special election in House District 30 of

the temporary 1975 plan would result in immediate and irreparable damage and injury could result because: (1) this Court has under consideration proposed court-ordered plans for the reapportionment of the Mississippi Legislature; (2) this Court has set a schedule of discovery for the plaintiffs, the plaintiff-intervenor and the defendants which runs through January 16, 1978 and has further set this matter down for further evidentiary hearings on February 14, 1978; (3) this Court has indicated that it will make a decision in this matter, promptly, after the scheduled hearings are completed; (4) this Court may well adopt a plan of apportionment for the Legislature which would substantially alter the geographic boundaries of House District 30, and therefore any special election in House District 30 (temporary 1975 plan) would be a useless and expensive undertaking which would result in substantial cost to the candidates who would be participating and to the counties which would be holding the election; and therefore the Court having determined that plaintiffs' motion should be granted, it is therefore

ORDERED that the defendant Governor Cliff Finch, his officers, agents, employees, attorneys, and all persons in active concert and participation with him are hereby restrained and enjoined until the hearing and determination by the Three-Judge District Court of plaintiffs' motion for preliminary injunction and pending further order of the Court from issuing any writ of election for or otherwise authorizing a special election to fill the vacancy in the Mississippi House of Representatives created by the resignation of Representative Goerge W. Rogers, Jr., in Warren and Claiborne Counties.

ORDERED on this the 6th day of December, 1977, at 11:30 o'clock, A.M.

FOR THE COURT:

/s/ Dan M. Russell, Jr.
United States District Judge

Approved as to form:

/s/ Frank R. Parker
Attorney for Plaintiffs

/s/ Giles W. Bryant
Attorney for Defendants

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D.C. 20530

[SEAL]

July 31, 1978

Honorable A. F. Summer
Attorney General of the
State of Mississipi
Department of Justice
Jackson, Mississippi 39205

Dear Mr. Attorney General:

This is in reference to the reapportionment of the Mississippi Senate and House of Representatives, S.B. 3098 and H.B. 1491, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on June 1, 1978.

This is also in further reference to your letter of July 26, 1978, to the Attorney General concerning this submission and our response thereto of July 28, 1978.

In your July 26 letter you requested that the time for the Attorney General to respond to your submission he extended 10 days, until August 10, 1978, to allow you an opportunity to confer with the Attorney General and present supplemental information in support of your submission. On July 28, 1978, we responded by explaining that while we have no authority under our procedural guidelines to waive the 60-day period we would normally have upon the presentation of additional information, we were aware of the time factors involved

and would make every effort to make a final decision within ten days of our receipt of that information. According to your conversation of July 31, 1978, you did not consider this response acceptable. We therefore find it necessary to respond today to your submission since this is the 60th day.

We should note at the outset that the burden of proof under Section 5 is on the submitting authority. See *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *United States* v. *Georgia*, 411 U.S. 526 (1973); 28 C.F.R. 51.19. Thus if the Attorney General is not satisfied both that the purpose of the submitted redistricting plans and their effect is not racially discriminatory an objection under Section 5 is required.

Our analysis of the submitted plans, in addition, must be made in the context of the history of racial discrimination in the State of Mississippi and of the present status of blacks in the State of Mississippi. Blacks in Mississippi have been the victims of decades of discrimination in the political process and in other areas; the effect of that discrimination, and in some instances the discrimination itself, continues. Substantial evidence exists that whites rarely vote for black candidates or candidates positively supported by blacks and that the vote of blacks is rarely decisive in an electoral contest between white candidates. In addition, available evidence indicates that the Mississippi legislature has not been responsive to the needs of blacks.

With respect to the analysis of the submitted plans, statistical data show that because the State's black population is generally younger than its white population a black majority in a legislative district does not imply a black majority in voting age population in such a district. Furthermore, because of the effects of discrimination and because of the low socio-economic status of blacks in Mississippi compared to whites (itself in part the result of discrimination), the registration and voting

rates among blacks are lower than such rates among whites. Finally, demographic changes since the 1970 census render less reliable any conclusion that a particular district has in fact the black population percentage that the available statistics suggest. As a result, caution must be used in the analysis under Section 5 of the submitted plans. The political influence of blacks in a district cannot be predicted from population statistics alone.

Against this background, we have been unable to conclude that the submitted plans for the Mississippi Senate and House of Representatives do not have the purpose or effect of abridging the right to vote because of race or color. A number of factors have led us to this conclusion.

First, the information presented to us concerning the criteria that were established for the plans and the methodology followed does not indicate the presence of any safeguards to prevent discrimination in the preparation of the plans.

Second, we have received no information explaining why these particular plans were adopted rather than other available plans that appear to provide a greater opportunity for black representation.

Third, we have received unrebutted information indicating that one purpose of the adopted plans was to preserve the seats of incumbent legislators. In this regard we note that none of the State's 55 senators and only 4 of the 122 representatives are blacks.

Fourth, the information available to us indicates that blacks and their representatives had at best a limited opportunity to influence the formulation of the submitted plans.

Fifth, we have received no evidence indicating support among blacks for the submitted plans.

Sixth, the configuration of Senate and House districts in a number of areas suggests a purpose to minimize black influence. This is suggested, for example, by the treatment of Holmes and Humphreys Counties, the City of Greenville, Hinds County, and Copiah County in the Senate plan and by the treatment of Marshall County, the counties in Districts 9, 10, and 11, the Cities of Greenville, Greenwood, and Vicksburg, Hinds County, and Adams County in the House plan.

Accordingly, on the basis of the information we have I must, on behalf of the Attorney General, interpose an objection to the implementation of the reapportionment of the Mississippi State Senate and House of Representatives, set forth in S.B. 3098 and H.B. 1491.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition the Procedures for the Administration of Section 5 (28 C.F.R. 51.21(b) and (c), 51.23, and 51.24) permit you to request the Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District Court obtained, the effect of the objection by the Attorney General is to make the redistricting plans legally unenforceable.

Sincerely,

/s/ Drew S. Days III

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1013

PEGGY J. CONNOR, HENRY J. KIRKSEY, ET AL.,
Petitioners,

v.

HONORABLE J. P. COLEMAN, United States Circuit Judge; HONORABLE DAN M. RUSSELL, JR., United States District Judge; HONORABLE HAROLD COX, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
Respondents.

RESPONSE OF THE JUDGES, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI

JAMES P. COLEMAN
United States Circuit Judge

DAN M. RUSSELL, JR.
Chief
United States District Judge

HAROLD COX
United States District Judge
P.O. Box K
Ackerman, Miss., 39735

January, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Respondents.

RESPONSE OF THE JUDGES, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI

The undersigned members of the 3-Judge District Court hope that a brief response to the Motion for Leave to File a Petition for Writ of Mandamus may be helpful. Accordingly, we respectfully file this response, in which we seek to set forth the present status of this litigation.

I

On May 31, 1977, the Supreme Court disapproved the *single member* Mississippi legislative reapportion-

ment plan devised by this Court for the reason that it failed to meet the requirement that legislative districts be "as nearly of equal population as is practicable", Connor v. Finch, 431 U.S. 407, 97 S. Ct. 1828, 52 L.Ed.2d 465. Respect for longstanding state policy against fracturing county lines (which had necessitated the population deviations then at issue) was held not to be an adequate cause for such deviations.

At all events, we were confronted with a most difficult problem because the voting precinct is the basic unit of Mississippi's electoral process. Precinct boundaries are formulated at the local level by county boards of supervisors. Each of the five county supervisors is elected from a single member district, generally referred to as a "beat"; the precincts have to conform to beat lines, and this has been true since the adoption of the Constitution of 1890. The 1970 federal census was not taken by precincts. The enumeration districts generally had no definable reference to precinct lines.

II

The mandate of the Supreme Court in Connor v. Finch, *supra,* was filed in our Court on July 28, 1977.

It was obvious that the only adequate way of getting reasonably accurate population figures upon which to construct legislative districts with *de minimus* population variations was to enlist, if possible, the financial resources of the State by legislative appropriation of the funds to do the necessary research.

Four days after the receipt of the Supreme Court mandate, we formally invited the Mississippi Legislature to file within ninety days a plan of its own composition, agreeably to the standards enunciated in Connor v. Finch, *supra.*

On August 9, 1977, the Governor called a special session of the Legislature to take action on the invitation which had been extended by the Court.

Without going into detail as to hundreds of thousands of dollars appropriated state funds, and the various actions taken by the Legislature, the necessary experts and special legal counsel were employed and put to work on the production of a reapportionment plan which would meet constitutional standards.

On February 14, 1978, a legislatively proposed *precinct* plan was submitted to the Court. A hearing was held, resulting in the filing of a final plan on March 7, 1978.

It was public knowledge that, using the data compiled and the staff employed in the composition of a court ordered plan, the legislature was seeking to enact a *statutory* plan which would meet constitutional requirements. These efforts culminated in reapportionment statutes, signed by the Governor on April 21, 1978.

The legislative enactment had to be submitted to the Attorney General of the United States in compliance with the Voting Rights Act. Had the statute received the approval of, or gone without the opposition of, the Attorney General this litigation would have been at an end.

The Attorney General did object, however, on July 31, 1978 (the last available day).

An action for § 5 declaratory relief was filed in the District Court of the District of Columbia, as the Court

is informed, on August 1, 1978. That case has been tried and the District of Columbia Court has set oral argument on January 16, 1979.

In the meantime, on June 12, 1978, we called on the parties to make an effort to settle their narrow differences over the court ordered plan, looking to a stipulated plan which would have ended the litigation.

By September 5, 1978, the parties had agreed on the geographical composition of the 174 legislative districts but they had differences of opinion about the wording of the necessary stipulation which would have ended in a consent decree.

At that time, the suit for a § 5 declaratory judgment in the District of Columbia Court had been on file for about thirty days. It is our recollection, which we have had no opportunity to verify by an actual review of the record, that the District of Columbia trial was scheduled to begin on September 18, or thereabouts.

III

Under Mississippi law, candidates who propose to run in Democratic or Republican primaries for the Legislature have until June 7, 1979, in which to file qualifying papers, a date now approximately five months away.

We have considered it to be not in the public interest to order the adoption of a court ordered plan at this time for if we should do so the plan would, of course, be widely publicized and much confusion would ensue if the legislatively enacted plan prevails in the District of Columbia Court, superseding our court ordered plan.

If the District of Columbia Court should fail to decide its case by May 7, 1979, thirty days ahead of qualifying time, a court ordered plan would then immediately be placed into effect, subject to whatever action that might be required by the course of later events. If at any time between now and May 7, the District of Columbia Court finds that the legislatively enacted reapportionment is unconstitutional, we would immediately institute a court ordered single member district plan.

IV

All pending vacancies in the Mississippi Legislature have been ordered filled in a judgment entered by this Court on January 2, 1979. The vacancies in House District 28 and in Senate District 15A did not come into existence until January 1, 1979. The vacancy in Senate District Number 6 occurred about the last week in December. The method to be used in filling these vacancies was agreed to by all the parties to this litigation.

The vacancy in House District 30 had existed for about a year, but a preliminary injunction against an election to fill that vacancy had been entered at the petition of the plaintiffs. The plaintiffs and those representing Governor Finch, Et Al, could not agree on the manner of filling this vacancy, whereupon the court entered the plan suggested by the plaintiffs and the Department of Justice.

The Governor immediately ordered special elections for January 13, 1979.

V

In pursuing this policy of not erecting a court ordered legislative reapportionment plan until May 7,

1979, or until the District of Columbia Court shall have acted adversely at an earlier date, this Court has adhered to the teachings of the Supreme Court in Wise v. Lipscomb, —— U.S. ——, 98 S.Ct. 2493, 2497 (1978):

> The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt. When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. "[A] State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part should not be restricted beyond the clear commands of the Equal Protection Clause."
>
> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan pending later legislative action. In discharging this duty, the district courts "will be held to stricter standards . . . than will a state legislature . . . ."
>
> (Citations omitted).

This language in *Wise* v. *Lipscomb* was authored by Mr. Justice White, joined by Mr. Justice Stewart. However, no other Justice recorded disagreement with these principles.

VI

It is not entirely correct that the instant litigation has been "going on for thirteen years". Our plan for the election of legislators in 1967 was not appealed. The litigation was again fired up after the 1970 Census.

The litigation has not been without results:

(1) The 160 year old Mississippi policy of having numerous multi-member legislative districts has been dismantled;

(2) The 160 year old policy against fracturing county lines in the election of legislators has been dismantled;

(3) The Legislature, with voter approval, has provided for a Legislative Reapportionment Commission which will act hereafter in reapportionment matters if the Legislature fails to act; and

(4) The population data so badly needed in our previous efforts to reapportion were obtained.

CONCLUSION

If the Supreme Court should be of the opinion that our handling of the situation herein described amounted to an abuse of judicial discretion, or that for any cause a court ordered reapportionment plan should be entered without waiting on the decision of the District of Columbia Court, it will not be necessary for the Court to expend the judicial effort required to hear and determine a mandamus proceeding. We stand ready immediately to obey the directions of the Supreme Court of the United States if any are stated in the disposition of the Motion to which this response is filed.

Respectfully submitted,

JAMES P. COLEMAN
United States Circuit Judge

DAN M. RUSSELL, JR.
Chief
United States District Judge

HAROLD COX
United States District Judge
P.O. Box K
Ackerman, Miss., 39735

January, 1979

No. 78-1013

In the Supreme Court of the United States

OCTOBER TERM, 1978

PEGGY J. CONNOR, ET AL., PETITIONERS

v.

J. P. COLEMAN, UNITED STATES CIRCUIT JUDGE, ET AL., RESPONDENTS

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
JOAN F. HARTMAN
Attorneys
Department of Justice
Washington, D.C. 20530

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v.

J. P. COLEMAN, UNITED STATES CIRCUIT JUDGE, ET AL., RESPONDENTS

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

BRIEF FOR THE UNITED STATES

This brief is submitted by the United States in response to petitioners' Motion for Leave to File Petition for a Writ of Mandamus.

OPINION BELOW

Petitioners challenge the district court's decision to delay the entry of a final reapportionment plan. The district court has not entered an order delaying the entry of a final plan in this case, but it indicated at

hearings held on November 29, 1978, and January 2, 1979, that entry of final judgment would be postponed for an unspecified period. The transcripts of these hearings have been lodged with the Court.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1651(a). *Connor* v. *Coleman*, 425 U.S. 675 (1976).

QUESTION PRESENTED

Whether mandamus should issue to compel the district court to enter a final plan for reapportionment of the Mississippi legislature without further delay.

STATUTORY PROVISION INVOLVED

28 U.S.C. 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

1. This suit was brought by private plaintiffs in October 1965 and involves the reapportionment of the Mississippi legislature. It is before this Court for the sixth time,[1] on plaintiffs' motion for leave to file a petition for a writ of mandamus.

---

[1] See *Connor* v. *Johnson*, 402 U.S. 690 (1971); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Finch*, 431 U.S. 407 (1977).

The thirteen-year course of this litigation has not yet resulted in a reapportionment plan meeting constitutional standards. Reapportionment plans devised by the state were declared invalid by the district court in 1967 and in 1971 and by this Court in 1975. The district court imposed temporary plans for the 1967, 1971 and 1975 elections that were concededly inadequate due to lack of time and data to prepare a satisfactory plan. This Court reversed the 1976 final judgment of the district court on the ground that the population deviation among districts exceeded constitutional limits. *Connor* v. *Finch*, *supra*.

In the twenty months since this Court's remand in *Connor* v. *Finch*, *supra*, the district court has received proposed plans and modifications from the parties and the Special Master and a hearing has been held on the proposals. The parties reached tentative agreement on a settlement plan but negotiations broke down over the wording of the consent decree. In hearings conducted on November 29, 1978, and January 2, 1979, the district court informed the parties that the entry of a final plan would be delayed pending the conclusion of litigation pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, in the District Court for the District of Columbia concerning the 1978 reapportionment legislation, *State of Mississippi* v. *United States*, Civil No. 78-1425. The court noted that it would act in time so that a new plan would be in place for the August primaries. Special elections were ordered on January 2, 1979, to fill four vacant seats in specially-drawn districts (App. A

and B, *infra*, 1a-7a) and three elections have been held. On January 16, 1979, the court ordered a special election to fill an additional vacancy in the House (App. C, *infra*, 8a-9a). The filing deadline for candidates for the 1979 general elections is June 7, 1979. Such is the posture of the case as it returns to this Court. In the special circumstances, however, it seems appropriate to detail the history of the litigation at length.

2. The Mississippi legislature consists of a 52-member Senate and a 122-member House of Representatives. The private plaintiffs brought this action in October 1965 alleging that the apportionment of the legislature violated the Fourteenth and Fifteenth Amendments. The three-judge court in July 1966 invalidated the 1962 apportionment of the legislature. *Connor* v. *Johnson*, 256 F. Supp. 962. That same year, the legislature enacted a new plan, and on March 3, 1967, the court held that plan unconstitutional and reapportioned the Senate and House of Representatives for the 1967 elections. 265 F. Supp. 492.

In 1971, the State enacted another reapportionment plan. That plan was held unconstitutional on May 18, 1971, and the district court formulated a plan to govern the 1971 elections. 330 F. Supp. 506. Most of the House districts and almost half of the Senate districts in this plan were constituted as multi-member districts. The court stated that it expected to appoint a Special Master to determine whether sub-

division into single-member districts would be feasible for the 1975 and 1979 elections. *Ibid.*

On plaintiffs' motion, this Court stayed the district court's judgment until June 14, 1971. *Connor* v. *Johnson*, 402 U.S. 690. This Court directed the district court "absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County by that date." *Id.* at 692. The district court did not divide Hinds County into single-member districts, however, because it found that there were insurmountable difficulties. *Connor* v. *Johnson*, 330 F. Supp. 521 (1971).

After the 1971 elections, this Court considered on direct appeal plaintiffs' challenge to the 1971 court-ordered reapportionment plan. *Connor* v. *Williams*, 404 U.S. 549. Noting with approval that the district court had retained jurisdiction over plans for Hinds, Harrison and Jackson Counties and had stated that a Special Master would be appointed in January 1972 to consider subdividing those counties into single-member districts, this Court directed that "[s]uch proceedings should go forward and be promptly concluded." *Id.* at 551. This Court declined to consider the prospective validity of the 1971 plan until proceedings were completed in the district court and a final judgment was entered respecting the entire state. *Id.* at 551-552. Without disturbing the 1971 elections, this Court vacated the district court's judgment and remanded the case for proceedings consistent with its opinion. *Id.* at 552. The district court

did not appoint a Special Master. *Connor* v. *Coleman*, *supra*, 425 U.S. at 676.

In April 1973 the Mississippi legislature adopted a reapportionment plan. *Connor* v. *Waller*, 396 F. Supp. 1308, 1310. After a hearing in February 1975, the State, in April 1975, adopted new legislation, *id.* at 1311. The district court then dismissed plaintiffs' complaint and directed the filing of an amended complaint addressing the 1975 legislation. *Id.* at 1311. Plaintiffs promptly filed an amended complaint, and in May 1975 the district court entered judgment approving the 1975 legislative plan. *Connor* v. *Waller*, 396 F. Supp. 1308.

On June 5, 1975, this Court reversed that judgment. *Connor* v. *Waller*, 421 U.S. 656. It held that the 1975 legislative acts would not be effective as laws until cleared in accord with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and that the district court erred in deciding constitutional challenges to the acts based upon claims of racial discrimination. The reversal of the district court decision was, however (421 U.S. at 656-657):

> without prejudice to the authority of the District Court, if it should become appropriate, to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan* v. *Howell*, 410 U.S. 315 (1973); *Connor* v. *Williams*, 404 U.S. 549 (1972); and *Chapman* v. *Meier*, 420 U.S. 1 (1975).

On June 9, 1975, Mississippi submitted the 1975 acts to the Attorney General for his consideration under Section 5. The Attorney General, on June 10, 1975, interposed an objection to the bills on the ground that Mississippi had failed to show that they did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race (75-1184 Pet. 6 n.1).

On June 11, 1975, the United States was permitted to intervene as a party plaintiff in the district court proceedings. In an order dated June 25, 1975, the district court advised the parties that it intended to formulate a "temporary plan for election of Senators and Representatives for 1975 * * * election ONLY," finding that there was insufficient time to formulate a final plan prior to the August 1975 primaries (75-1184 Pet. App. 84a-85a). The court stated, however, that it intended without unnecessary delay to formulate a permanent plan for the election of legislators in the quadrennial elections of 1979. When that shall have "been accomplished, special elections may be ordered in those legislative districts where required by law, equity, or the Constitution of the United States" (*id.* at 85a). The court, by orders dated July 8 and 11, 1975, formulated the temporary plan (75-1184 Pet. App. 26a-54a).

The temporary plan was similar to the 1971 court-ordered plan (vacated by this Court so that a permanent plan could be formulated) and to the 1975 legislative plan (objected to by the Attorney General under Section 5).

By order of August 1, 1975, the district court declined to establish a deadline for approval of a final plan (75-1184 Pet. App. 4a-5a). However, the court emphasized "its first determination to have this matter out of the way before February 1, 1976," and its expectation that it would "direct that [any required special elections] shall be held in conjunction with the 1976 Presidential election so as to save the expense of special elections, as far as possible" (*id.* at 5a).

The United States moved, on January 26, 1976, to establish February 10, 1976, as the date for a hearing on the proposed permanent plan (75-1184 Pet. App. 3a). The court, on January 29, 1976, denied the motion, deferring further hearing and decision until this Court ruled in three then-pending cases[a] (75-1184 Pet. App. 1a-2a).

Plaintiffs sought a writ of mandamus to vacate the district court's stay order and compel the district court to formulate promptly a reapportionment plan and to order necessary special elections to coincide with the November 1976 presidential and congressional elections. Finding no justification for the district court's delaying further a final decision in this case, this Court advised the district court to proceed to trial forthwith, to schedule a hearing within 30 days on all proposed permanent reapportionment plans, so that a permanent plan could be effective for

[a] *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977); *Beer* v. *United States*, 425 U.S. 130 (1976); *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976).

the 1979 elections, and to order any necessary special elections to coincide with the November 1976 elections or "at the earliest practicable date thereafter." *Connor* v. *Coleman*, *supra*, 425 U.S. at 679.

The district court held the required hearing and, on August 24, 1976, announced its decision setting forth the criteria it would apply and reapportioning the Senate (73-934 Pet. App., Vol. III, 94-108). The court reapportioned the House by order of September 8, 1976 (*id.* at 117-137).

The private plaintiffs and the United States thereafter requested special elections. The district court declined to order any special elections for the Senate and ordered special elections in only two House districts (*id.* at 226-229).

This Court reversed the judgment of the district court on May 31, 1977, holding that the court-ordered reapportionment plan failed "to meet the most elemental requirements of the Equal Protection Clause in this area—that legislative districts be 'as nearly of equal population as is practicable.' *Reynolds* v. *Sims*, 377 U.S. 533, 577; *Chapman* v. *Meier*, 420 U.S. 1." *Connor* v. *Finch*, 431 U.S. 407, 410. This Court found that the percentage deviations from population equality of 16.5% in the Senate plan and 19.3% in the House plan exceeded constitutional limits for a court-ordered plan. 431 U.S. at 417. This Court also provided guidance to the district court on the formulation of a plan that would not result in unconstitutional racial dilution, "since the 1979 elections are

on the horizon * * *." 431 U.S. at 422. Noting the irregular shapes of some districts with large black populations this Court instructed the district court to "draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted * * *." 431 U.S. at 425-426. This Court recognized that twelve years of litigation had not yet resulted in a constitutional reapportionment plan and remanded the case to the district court with instructions to formulate a final plan "with a compelling awareness of the need for its expeditious accomplishment, so that the citizens of Mississipppi at long last will be enabled to elect a legislature that properly represents them." 431 U.S. at 426.

3. On August 2, 1977, pursuant to the remand in *Connor* v. *Finch, supra,* the district court instructed the parties to file proposed plans. Five proposed plans were filed by the parties: (1) plan of the United States based on voting precincts, filed October 1977, revised February 1978; (2) plan of the United States based on Census enumeration districts, filed October 1977; (3) private plaintiffs' precinct plan, filed October 1977, revised February 1978, revised March 1978; (4) State's plan based on Census enumeration districts, filed October 1977; and (5) State's precinct plan, filed March 1978.

The trial began on November 21, 1977, and was concluded on February 14, 1978.

On April 21, 1978, the Mississippi Legislature enacted a reapportionment plan, signed by the Governor. 1978 Miss. Laws, chs. 515 and 535. The State submitted the statutory plan to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, on June 1, 1978. The Attorney General interposed an objection to the plan on July 31, 1978, after review of the State's submission because he was "unable to conclude that the submitted plans for the Mississippi Senate and House of Representatives do not have the purpose or effect of abridging the right to vote because of race or color" (Pet. App. 27a).

Meanwhile, the Special Master, appointed by the district court in 1975, filed a proposed plan on May 3, 1978, modified on May 9 and 11, 1978. On May 15, 1978, the district court instructed the Special Master to file a final plan and ordered the parties to file comments. The Master's final plan was filed on May 18, 1978, and the Master responded to the comments and made revisions on June 30, 1978.

The district court ordered a settlement conference on June 12, 1978. Settlement negotiations were thereafter conducted during June, July and August, resulting in a settlement plan that was presented by counsel for defendants to the Joint Reapportionment Committee of the Mississippi Legislature. The Joint Reapportionment Committee conducted a poll of the members of the legislature that indicated support for acceptance of the plan if the 1978 statutory plan did not receive clearance under the Voting Rights Act (Transcript of Nov. 29, 1978 hearing at 7-8, 42).

The settlement plan was not then submitted to the district court, however, because the negotiations broke down over the wording of the consent decree on September 5, 1978. Defendants insisted upon a stipulation that the settlement plan could not be introduced as evidence in the declaratory judgment action the State had filed in the District Court for the District of Columbia, a condition to which the United States and private plaintiffs could not agree (Transcript of Nov. 29, 1978 hearing at 34).

On August 1, 1978, the State filed suit in the District Court for the District of Columbia seeking a declaratory judgment that the 1978 acts do not have the purpose and will not have the effect of abridging the right to vote because of race or color. *State of Mississippi* v. *United States, supra.* Trial was held on September 18-27, 1978. Oral argument was held on January 16, 1979. One of the private plaintiffs in *Connor* v. *Finch, supra,* and nine other black Mississippi voters have intervened in the Section 5 litigation.

On August 2, 1978, defendants filed a motion to stay proceedings in *Connor* v. *Finch, supra,* until the conclusion of the Section 5 litigation in the District of Columbia. The United States filed an opposition to this motion on August 21, 1978. Private plaintiffs on October 12, 1978, requested the district court to enter final judgment and order the implementation of the settlement plan.

The district court did not formally rule on these motions but orally indicated at a hearing on Novem-

ber 29, 1978, that on the basis of this Court's opinion in *Wise* v. *Lipscomb,* No. 77-529 (June 22, 1978), "the right-of-way on matters of this kind is given to legislative enactments, that the court should not rush in with a court ordered plan as a general rule when a legislative plan is pending" (Transcript of Nov. 29, 1978 hearing at 3-4). Without specifying the time within which it would act, the district court stated that "if the District of Columbia court * * * should fail to approve the legislative plan, * * * this Court then is going to have to put a court ordered plan into effect with single member districts." *Id.* at 66. The court assured the parties that "[t]he election part is no emergency whatever because it's not going to take place until next August." *Id.* at 65. At a hearing on January 2, 1979, the district court repeated that "purely on the authority of *Wise* v. *Lipscomb,* * * * we've been waiting to see what the District Court in the District of Columbia would do about the legislative plan" (Transcript of Jan. 2, 1979 hearing at 7). The court reiterated its intention that if the District Court for the District of Columbia did not rule "in a timely fashion, why then this Court in plenty of time will put into effect a state court-ordered plan for the elections in August—the primary elections." *Id.* at 52.

The response of the district court to petitioners' motion, filed in this Court on January 17, 1979, indicates that the court will act by May 7, 1979, if no decision has been rendered by then in the Section 5 litigation (Resp. Br. at 5).

The private plaintiffs filed a motion for special elections on November 13, 1978. On January 2, 1979, the district court entered a consent order to hold special elections in two specially-devised Senate districts and one House district in order to fill vacancies (App. A, *infra*, 1a-3a). The district court also decreed a special election in one House district, not agreed to by all parties, to fill another vacancy (App. B, *infra*, 4a-7a). A special election to fill an additional House vacancy was ordered on January 18, 1979 (App. C, *infra*, 8a-9a).

ARGUMENT

The district court's decision to delay entry of a final reapportionment plan is not consistent with the rulings of this Court in *Connor* v. *Coleman*, *supra* and *Connor* v. *Finch*, *supra*. In both decisions this Court expressed its intention that the district court enter a legally valid reapportionment plan for the 1979 election. In *Connor* v. *Coleman*, *supra*, 425 U.S. at 679, this Court instructed the district court to order trial forthwith and to enter final judgment of reapportionment for the 1979 elections and for special elections to coincide with the 1976 presidential elections or the earliest possible date thereafter. In *Connor* v. *Finch*, *supra*, 431 U.S. at 426, the district court was instructed to enter final judgment

> with a compelling awareness of the need for its expeditious accomplishment, so that the citizens of Mississippi at long last will be enabled to elect a legislature that properly represents them.

While the district court embarked upon that responsibility and conducted all proceedings necessary to the

adoption of a final plan, it has stopped short of executing its mandate. Since its failure to act promptly may well result in implementation of a legally defective plan we believe further delay is unwarranted.

If the plan entered by the district court does not meet the standards for court-ordered reapportionment plans, appeal will be necessary to ensure that elections are held under a valid plan. While the district court has assured this Court that it will enter a plan by May 7, that will not provide sufficient time to take an appeal and have a plan in place for the August primaries.[a] One need not prejudge the district court's action. But the history of the case suggests that an appeal might well be warranted.

The district court correctly indicated that its action in entering a final plan would not abridge the right of the State of Mississippi to seek to obtain approval of its legislatively adopted plan under Section 5 of the Voting Rights Act of 1965 (Transcript of Nov. 29, 1978 hearing at 11). Nevertheless, the court declined to take such action in light of this Court's decision in *Wise* v. *Lipscomb*.

The district court apparently regards this Court's decision in *Wise* v. *Lipscomb*, *supra*, as altering its

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[a] Mr. Justice Douglas in a concurring opinion in *Ely* v. *Klahr*, 403 U.S. 108, 122 (1971), involving the reapportionment of the Arizona legislature, reviewed a number of voting cases that had been mooted by elections conducted during the pendency of an appeal and concluded that for this Court to decide such an appeal on the merits by July, the appeal must be filed in February. Even under the expedited schedule in *Connor* v. *Finch*, *supra*, judgment was not had until July 31, 1977, after probable jurisdiction was noted on December 8, 1976.

obligation to enter a final plan forthwith. However, that opinion simply restates the well-recognized principle that the federal courts should not preempt the legislative task of reapportionment and should afford legislatures a reasonable opportunity to act. At the same time, this Court recognized that the "imminence of a state election" may make deference to legislative reapportionment "impractical" and require the imposition of a court-ordered plan. *Wise* v. *Lipscomb*, *supra*, slip op. 4.

The rule of deference, where possible, to legislative reapportionment embodies both a respect for the proper role of federal courts in our federal system and a recognition that state legislatures are better equipped to reconcile the competing interests involved in reapportionment. Thus, where possible, a valid legislative reapportionment plan will supplant a court-ordered plan if available in time for the elections. Moreover, a court should avoid discouraging legislative solutions to problems of apportionment. But immediate action by the district court in this case does not conflict with those principles since the legislature has already acted by adopting a plan on April 21, 1978. Thus, as in *Burns* v. *Richardson*, 384 U.S. 73, 85 (1966), "the question of embarrassment of state legislative deliberations may be put aside." And, as the district court recognized, adoption of a court-ordered plan will not prevent the implementation of a legislative plan if it proves to be valid. Nor is this a case where the legislature has not had a reasonable opportunity to act. The district court has already had to enter temporary plans to govern the 1967, 1971 and 1975 elections.

Indeed, the district court apparently recognized that the legislative plan is not an actual barrier to the entry of final judgment in this case since the court indicated at the hearing held on November 29, 1978, that, had the parties been able to execute a consent decree concerning the settlement plan, the court would have immediately entered final judgment (Transcript of Nov. 29, 1978 hearing at 35), even though Section 5 litigation had already begun by September 1978 when settlement negotiations broke down.

Immediate action would not involve a waste of judicial resources. All parties have filed plans, the Special Master has drafted a plan and made modifications in response to the parties' comments and the district court has been presented with a settlement plan to which all parties tentatively agreed. The district court need only choose one of these plans, which are familiar to all the parties, and enter final judgment requiring implementation of the plan during the 1979 elections. No substantial effort in formulating a new plan is now required of the district court.

The pendency of the action filed by the State in the District Court for the District of Columbia furnishes no justification for the district court in this case to postpone the entry of judgment. If the State should succeed in obtaining a declaratory judgment that the 1978 legislative reapportionment does not violate the Voting Rights Act, the statutory plan would "be

effective as laws." *Connor* v. *Waller*, *supra*, 421 U.S. at 656. But it cannot be assumed that such a result will be obtained in this complex Section 5 litigation, and especially that this result will occur in the near future. Even if the District Court for the District of Columbia renders its decision shortly, the State may take an appeal on the merits to this Court if the declaratory judgment is denied and it is possible that the defendants-intervenors or the United States would appeal if the declaratory judgment is granted to the State. Additional litigation challenging the legislation under the Fourteenth and Fifteenth Amendments would not be foreclosed by a decision favorable to the State under Section 5, 42 U.S.C. 1973c.

While, in the usual case, the district court might be justified in delaying entry of a plan if there were strong reasons to believe that such action would prove unnecessary, that reasoning should not apply here. To delay action which may be necessary to vindicate the right of Mississippi voters on the assumption that the legislative plan is legally valid ignores both the law and the past history of this case. The legislative plan is not "effective as law" unless precleared by the District Court for the District of Columbia. While we do not know what that court will decide, the State has the burden of proving the plan's validity. The last three legislative plans—in 1967, 1971 and 1975 [4] —have not met legal requirements, and the Attorney General has interposed an objection to the plan pres-

[4] The 1973 plan was replaced by the 1975 plan.

ently pending before the District Court for the District of Columbia.

The possible future mootness of a court-ordered plan by the issuance of a declaratory judgment with regard to the statutory plan is no deterrent to action by the district court in this case. Mootness must be judged on the state of the facts in existence at the time a case is ripe for judgment. *Kremens* v. *Bartley*, 431 U.S. 119 (1977). Unpredictable future action by other courts or persons should not defeat the timely and orderly entry of a long-delayed final judgment in this action.

The district court states in its Response that the delay of final judgment is designed to avoid confusion that might arise if a court-ordered plan were later supplanted by the legislative plan (Resp. Br. at 4). If the court's reference is to the electorate, we believe its fear is unwarranted. The entry of a final plan will have little immediate effect on the voters. The record does not establish, and it is far from clear, that the interests of potential candidates are advanced by avoiding confusion at the expense of total ignorance of voting districts. Moreover, the desire to avoid confusion cannot outweigh the potential loss of an opportunity to take an appeal on the merits.

The vindication of the constitutional rights of Mississippi voters, including the plaintiffs, in this "painfully protracted process of litigation," *Connor* v. *Finch*, *supra*, 431 U.S. at 410, should not be postponed on such uncertain grounds.

We urge this Court to adopt the action taken in

Connor v. *Coleman*, *supra*, to grant private plaintiffs' motion for leave to file the petition, but to postpone consideration of the writ of mandamus, with instructions to the district court that further delay is unwarranted and not in accord with the mandate of *Connor* v. *Finch*, *supra*.

CONCLUSION

For the reasons stated, the motion for leave to file a petition for a writ of mandamus should be granted, and the district court should be instructed to adopt a final plan for the reapportionment of the Mississippi legislature without further delay.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
JOAN F. HARTMAN
Attorneys

FEBRUARY 1979

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3830(A)

PEGGY J. CONNER, ET AL., PLAINTIFFS
and
UNITED STATES OF AMERICA, PLAINTIFF-INTERVENORS

vs.

CLIFF FINCH, ET AL., DEFENDANTS

CONSENT ORDER

By stipulation and agreement of the parties, it is

ORDERED, ADJUDGED, AND DECREED:

That special elections to fill vacancies in the Mississippi Legislature to be ordered by the Governor of Mississippi shall be ordered in the manner and within the time provided by Mississippi law in the following districts as defined herein:

Senate District	Components	Pop.	Black Pop.	% Black Pop.
6	LOWNDES COUNTY: All except Air Base Precinct	43,077	15,508	36.00
	Deviation from Norm: +1.04%			
15A	HOLMES COUNTY: All			
	MADISON COUNTY: Beat 1 Beat 4 Beat 5			
	YAZOO COUNTY: Beat 4			
	TOTALS DISTRICT 15A	45,726	30,972	67.73
	Deviation from Norm: +7.25%.			
House District				
28	MADISON COUNTY: Beat 1 Beat 4 Beat 5			
	TOTALS DISTRICT 28	19,853	13,351	67.25
	Deviation from Norm: +9.26%			

ORDERED ADJUDGED AND DECREED on this the 2nd day of January, 1979.

/s/ Jas. P. Coleman
JAS. P. COLEMAN
United States Circuit Judge

/s/ Dan M. Russell, Jr.
DAN M. RUSSELL, JR.
United States District Judge

/s/ Harold Cox
HAROLD COX
United States District Judge

AGREED AND STIPULATED TO:

/s/ Frank R. Parker
FRANK R. PARKER
Attorney for the Plaintiffs

/s/ A. F. Summer
A. F. SUMMER
Attorney for Defendants

/s/ Jeremy L. Schwartz
JEREMY L. SCHWARTZ
Attorney for Plaintiff-Intervenor

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3830(A)

PEGGY J. CONNER, ET AL., PLAINTIFFS

UNITED STATES OF AMERICA, INTERVENOR

v.

CLIFF C. FINCH, ET AL., DEFENDANTS

DECREE PROVIDING FOR THE FILLING OF A VACANCY IN THE MISSISSIPPI STATE HOUSE OF REPRESENTATIVES WHICH HAS OCCURRED IN DISTRICT 30

This day this three-judge Court was convened, on adequate notice to the parties, to determine how a vacancy in the Mississippi House of Representatives from District 30 should be filled pursuant to a vacancy being caused by the resignation of Representative George Rogers.

Counsel for all parties were present and appeared in open court and made their representations to the Court as to how this vacancy might be filled.

Having heard these representations and having conferred on the matter

IT IS NOW ORDERED, ADJUDGED AND DECREED that the vacancy in District 30 for the election of representatives in the Mississippi Legislature

occasioned by the resignation of Representative George Rogers shall be filled as follows:

The Supreme Court of the United States having previously adjudicated that this Court may no longer order elections from multiple-member legislative districts in this state, District 30 as established in our prior decree for the election of legislators in the year 1975 shall be divided into three segments which hereafter shall be known as District 30, District 30A, and District 30B, as follows:

District	Components	Unit Pop.	County Pop.	Black Pop.	% Black Pop.
30	Claiborne County: All		10,086	7,522	74.58
	Warren County: Precincts of Redbone, Yokena, Jett & No. 7 Fire Station	8,794	8,794	2,598	29.54
	TOTAL DISTRICT 30 Deviation: +3.90		18,880	10,120	53.60
30A	Warren County: Precincts of Goodrum, Jonestown, Tingle, Beechwood, Culkin, Bovina, Oak Ridge, Redwood, Cedar Grove, King	18,539	18,539	5,298	28.57
	Deviation: +1.44				
30B	Warren County: Precincts of Walters, Brunswick, St. Aloysius, Auditorium, American Legion & Central Fire Station	17,643	17,643	10,459	59.28
	Deviation: —2.9				

Representative Cross, who was elected in 1975, is presently a resident of District 30. Representative Beulow, who was elected in 1975, is presently a representative of District 30A.

Therefore, a special election shall be called as speedily as possible consistent with the requirements of the applicable provisions of the Constitution of Mississippi and the statutes of said state in District 30B for the election of one member of the House of Representatives who shall serve until January 1, 1980.

The Court wishes it distinctly understood that the sole and only purpose of this decree is to fill a vacancy existing in District 30 as established in 1975 and it is not intended to have, nor does it have, any relevance in any state-wide Court ordered legislative plan which this Court may hereafter adopt, if it should become necessary that the Court enter such a plan. Our purpose is to fill a vacancy existing in a district as established in 1975 and in order that the district may have the representation to which it is entitled in the presently sitting session of the Mississippi legislature.

This plan does not meet with the approval of all of the parties to this litigation and is intended by the Court in the discharge of its responsibilities in the premises.

SO ORDERED, ADJUDGED AND DECREED at Jackson, Mississippi on this January 2, 1979.

/s/ Jas. P. Coleman
JAS. P. COLEMAN
United States Circuit Judge

/s/ Dan M. Russell, Jr.
DAN M. RUSSELL, JR.
Chief Judge, United
States District Court

/s/ Harold Cox
HAROLD COX
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3830(A)

PEGGY J. CONNER, ET AL., PLAINTIFFS
and
UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR

vs.

CLIFF FINCH, ET AL., DEFENDANTS

ORDER DIRECTING SPECIAL ELECTION TO FILL A VACANCY IN THE MISSISSIPPI HOUSE OF REPRESENTATIVES

Before COLEMAN, Circuit Judge, RUSSELL, Chief District Judge, and COX, District Judge.

PER CURIAM:

It being made known to the Court that Jimmie Ray McCalla has resigned his seat from District 1B in the Mississippi House of Representatives

IT IS ORDERED, ADJUDGED, and DECREED that said vacancy shall be filled by an election to be held from a District described as follows:

Dist. No.	Components	Population	% Variance	% Black Population
1B	ALCORN COUNTY: All except the Precincts of Glen, Farmington, East Corinth, Rienzi, Biggersville, Bethel, Jacinto, and Union	17,273	−4.94	13.37

The Clerk will provide a certified copy of this Order to Counsel for parties to this litigation and to the Governor of Mississippi, whose function it is to set the date for a special election to fill the vacancy.

A copy of this Order will likewise be furnished the Circuit Clerk of Alcorn County, Mississippi, for the use of the Election Commissioners in said County when the Governor shall have called said special election.

SO ORDERED, ADJUDGED, and DECREED, this the 16 day of January, 1979.

/s/ Jas. P. Coleman
JAS. P. COLEMAN
United States Circuit Judge

/s/ Dan M. Russell, Jr.
DAN M. RUSSELL, JR.
Chief
United States District Judge

/s/ Harold Cox
HAROLD COX
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 286355 311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1013

PEGGY J. CONNOR, HENRY J. KIRKSEY, ET AL.,

Petitioners,

v.

HONORABLE J. P. COLEMAN, United States Circuit Judge, HONORABLE DAN M. RUSSELL, JR., United States District Judge, HONORABLE HAROLD COX, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,

Respondents.

RESPONSE TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS, AND BRIEF IN SUPPORT THEREOF

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 18-1013

PEGGY J. CONNOR, HENRY J. KIRKSEY, ET AL.,

Petitioners,

vs.

HONORABLE J. P. COLEMAN, United States Circuit Judge, HONORABLE DAN M. RUSSELL, JR., United States District Judge, HONORABLE HAROLD COX, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,

Respondents.

RESPONSE TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS, AND BRIEF IN SUPPORT THEREOF

COUNTER-STATEMENT OF THE CASE AND STATEMENT OF FACTS

In three orders dated June 25, July 8, and July 11, 1975, the district court (hereinafter referred to as "Respondents" and as "the *Connor* court") formulated the temporary reapportionment plans under which the 1975 Mississippi

legislature's quadrennial elections were held and instructed the parties to file within ninety days plans for the permanent reapportionment thereof. All parties submitted proposed permanent plans. The district court, however, perceiving itself to be in need of guidance from this Court on the then recently-injected issue of racial dilution, entered an order on January 29, 1976, deferring further hearings and decision on a permanent plan pending the resolution of three cases before this Court, i.e., *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976); *Beer* v. *United States*, 425 U.S. 130 (1976); *United Jewish Organization of Williamsburg, Inc.* v. *Carey*, 435 U.S. 167 (1977).

Plaintiffs thereafter motioned this Court for leave to file a petition for a writ of mandamus. On May 19, 1976, this Court, in granting the motion, determined that there then was no occasion for the district court to postpone *any longer* the hearing on the proposed permanent reapportionment plan since two of the cases had been decided subsequent to the district court's entry of the deferral order, and the third case, i.e., *United Jewish Organization of Williamsburg, Inc.* v. *Carey, supra*, presented no question similar to that presented in the case *sub judice*. Accordingly, this Court, although not issuing the writ, stated its view that the district court should schedule a hearing within thirty days on all proposed permanent reapportionment plans to the end of entering a final judgment embodying a permanent plan for the 1979 legislative elections. *Connor* v. *Coleman*, 425 U.S. 675 (1976).

In compliance with this Court's directions, the district court held a hearing on June 15, 1976. On August 24, 1976, the district court ordered into effect a statewide single-member district plan for the 52-member Senate, *Connor* v. *Finch*, 419 F.Supp. 1072 (1976); and on September 8, 1976, the district court ordered into effect a statewide single-member district plan for the 122-member

House, *Connor* v. *Finch*, 419 F.Supp. 1089 (1976).[1] For the first time in the history of the State of Mississippi, counties were fractionalized in the creation of legislative districts. Final judgment was entered and all parties appealed therefrom. This Court noted probable jurisdiction and expedited the consolidated appeals.

On May 31, 1977, while this Court acknowledged that the district court took a substantial step forward in its final decree by eliminating multimember districts, it set aside the decree because of the excessively high population variances in the plans. *Connor* v. *Finch*, 431 U.S. 407 (1977). This Court noted that it did not mean to obscure the significance of the advance by setting aside the decree. *Connor* v. *Finch, supra*, note 27, at 425. It nevertheless remanded the case with directions that the district court approach the task of devising a reapportionment plan not only with a compelling awareness of the need for its expeditious accomplishment, but also with great care.

It is true that, as of this writing, the Respondents have not entered judgment in the case below. It is not true as alleged in the Petitioner's brief (page 4), that "[t]he District Court . . . has . . . once again *delayed* consideration of a permanent court-ordered plan for the 1979 elections." (emphasis added) As will be demonstrated in succeeding parts of this brief, the district court has brought the litigation below to a point where there is a reapportionment plan (hereinafter referred to as "the compromise plan") before the court which is acceptable to Petitioners and Intervenors, and is conditionally acceptable to the Mississippi Legislature as a court-ordered plan. Also before the district court is the legislature's court precinct plan which has substantially the same impact on black voting strength as does the

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[1] In response to Plaintiffs' objections, the district court amended the reapportionment of the House of Representatives in ten districts. The district court further ordered special elections in two House districts. 422 F.Supp. 1014 (1976).

compromise plan.[2] Out of deference to the legislature's efforts to seek Section 5 preclearance, neither plan has been implemented to date.[3]

Defendants below believe that a thorough recitation of events commencing with the Court's opinion in May of 1977 [4] will satisfy this Court that the mandamus relief sought is unwarranted. Defendants therefore present this "Counter Statement of the Case and Statement of Facts" so that the Court will have an accurate picture of the Mississippi reapportionment effort as it now stands and to place the action of the Respondents in proper perspective. When viewed in light of all relevant facts, it will be clear that the status of proceedings below does not warrant the extraordinary relief here sought.

Although this Court in May, 1977, reversed the 1976 district court decision which announced a statewide reapportionment plan because it allowed greater than requisite *de minimus* deviation from one man-one vote, that mandate was not received by the district court until July 28, 1977. (B-2)[4a] The district court promptly responded to the mandate. On August 2, 1977, the district court issued

[2] Two other plans submitted to the district court by Petitioners and Plaintiff-Intervenors are not acceptable because they do not comply with the one-man-one-vote rule. Petitioners' plan, the so-called "Henderson Plan," and the Department of Justice plan, referred to as the "Tanner Plan," are discussed in the affidavit of Thomas Hofeller in Appendix G.

[3] Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(c), referred to throughout this brief as "Section 5."

[4] *Connor* v. *Finch*, 431 U.S. 407 (1977). The prior history is set forth in abbreviated fashion in that opinion, *id.* 410 413. We believe the only relevant proceedings are those which have occurred since this Court's May, 1977 opinion. However, in order to facilitate the presentation of these events, we have set forth herein the pertinent proceedings immediately leading up to this Court's 1977 decision in *Connor*. A more complete history of earlier events is presented in Appendix A, should the Court desire to review in detail the events prior to 1977.

[4a] References are to the appropriate Appendix and page number.

an order which required the parties and also invited the legislature to file proposed plans with 90 days. *Connor* v. *Finch*, 422 F.Supp. 1014 (1977).

During that subsequent 90-day period, there ensued a flurry of activity by the executive and legislative branches of the government of the State of Mississippi. That the legislature reacted promptly to the invitation of the district court is not subject to dispute; the affidavit of William A. Allain, Esq., Special Counsel to Mississippi in *Connor*, makes this clear beyond serious contention.[5]

On Sunday, August 7, 1977, counsel for the Connor defendants and the legislature met in order to prepare for a meeting with the election committees of each house set for the following day. (B-2; D-1-2) On August 8, 1977, a meeting of the members of the House Committee on Apportionment and Elections and the Senate Committee on Elections was held in the Office of the Attorney General of the State of Mississippi for the purpose of responding to the district court's invitation. (B-2-3; D-1-2) Following that meeting, certain members of the legislature, the Mississippi Attorney General, and the Governor of the State met to discuss the matter. (Ibid.)

On August 9, 1977, the Governor issued a proclamation calling all members of the Mississippi Legislature to convene in special session for the purpose of considering the invitation of the district court. Three days later, on August 12, 1977, the Mississippi Legislature convened in special session and created the Special Joint Legislative Committee on Reapportionment (hereinafter referred to as the "Joint Committee") (B-3; D-1). On the following day. August 13, 1977, the newly-created Joint Committee met and organized. The Joint Committee created a subcommittee to interview and employ experts to assist in the formulation of reapportionment plans. (B-4)

[5] A copy of the affidavit is found in Appendix B to this brief.

At the suggestion of the Mississippi Attorney General, A. F. Summer, the Committee retained as Special Counsel, Mr. Jerris Leonard of Washington, D.C., former Assistant Attorney General of the United States for Civil Rights. (B-3; D-2-3; E-6) The Committee interviewed outside experts on reapportionment suggested by the Attorney General of Mississippi, Special Counsel Jerris Leonard, and Mr. Marshal Turner, Assistant Chief of the Demographic Census Staff of the United States Bureau of the Census. As a result of this process, Mr. Thomas Hofeller of California, Dr. Delbert Dunn of Georgia, Mr. Calvin Webb of New York, and Dr. Richard Morrill of the State of Washington, all experienced in reapportionment, were retained. (B-3-6; D-3-4; D-16-20; D-30; D-39-41)

Before these experts commenced their task, they received legal guidance from the Committee's Special Counsel (B-6; D-20-21; D-36; E-1). Committee experts and staff were instructed to minimize population deviation among districts and to avoid dilution of black voting strength. Subsidiary goals were to observe Mississippi's historic concern for the preservation of county lines and to create compact and contiguous districts. (D-20-21; D-34-37; D-40-41)

The legislature's committee staff, aided by the retained experts, commenced its efforts to construct reapportionment plans for Mississippi in August of 1977. (B-2-3; D-1; D-19-20; D-32; D-40) The committee and its staff pursued a two-fold responsibility — preparation of plans *both* for consideration by the *Connor* court in response to its invitation *and* by the legislature for the purpose of statutory reapportionment.[6] (D-1-4)

The initial plans developed for submission to the *Connor*

[6] Different plans for presentation to the district court and for consideration by the legislature were prepared due to the greater flexibility accorded by this Court to legislatures in apportionment maters. *Chapman* v. *Meier,* 420 U.S. 1 (1974).

court and for enactment by the legislature were based on Census Enumeration District lines (ED's) rather than on precinct lines. (D-23-27; D-35) Precincts in Mississippi have irregular shapes and the lines do not correspond with the census ED lines. There is no census information uniformly available throughout the State of Mississippi by precinct. ED's are the only basis upon which census information is available for the non-metropolitan areas of the state. Therefore, the staff concluded to develop its initial plans based on ED's. (D-23-27) This effort led to public hearings on the Court ED plans commencing on October 11, 1977, and on the Statutory ED plans on November 28, 1977. (D-4-8; D-12-13; D-37-38) Prior to these hearings, statewide public notices were purchased in newspapers and on radio and plans then under consideration were distributed throughout the state for advance study by the public so that there would be opportunity for meaningful comment, including the submission of alternative plans. (B-8; D-9-14; E-7; E-8)

The November hearings led to the adoption of the Statutory ED plans by the House and Senate at a special session of the Legislature called for that purpose in December, 1977. (B-12) The Court ED Plans, which had been the subject of the October hearings, had earlier been submitted to the *Connor* court in Jackson. (Petitioner's Appendix, pp. 4a-5a). Both the Legislature and the court, after reviewing the ED Plans, expressed a preference for plans based on precinct lines. (D-26-27; D-35) The preference for the precinct lines was engendered by a desire to avoid the voter confusion created by the split precincts in the ED Plans which would require re-registration of voters. (D-14-15) Indeed, Plaintiffs and Intervenor in *Connor* had indicated that such confusion would be more detrimental to blacks than whites. (D-15)

Because of the expressed court preference, the Joint Committee staff was directed in late Decmber, 1977, to

convert the ED plans to precinct plans by moving the boundaries of districts based on ED's to the nearest precinct line. (D-24-27) This process was time consuming. In order to convert the ED plans to precinct plans, it was necessary to obtain data for each side of any ED split by a precinct line. Even to begin obtaining this data, the Committee staff was required to draw the "split" of each ED on a census map of the ED and then forward the map to the Census Bureau. The Census Bureau would then perform computations using these maps and workpapers from the 1970 census and return population figures for both sides of the line dividing the ED. (D-26-28)

The Committee staff was well into the effort of converting its ED plans into precinct plans when the plans proposed by the Plaintiffs and Intervenors in the *Connor* litigation first surfaced in final form. In point of fact, the *Connor* Plaintiffs' plan (hereinafter referred to as "the Henderson Plan") was submitted to the *Connor* court on March 23, 1978, the same day the legislature began voting on the Committee's proposals for precinct-based plans.[7] (E-9-10; E-11-12)

Similarly, the Intervenor's plan, (hereinafter referred to as the "Tanner Plan") was filed with the *Connor* court in February, 1978. (Petitioner's Appendix, p. 12a) This was Tanner's second attempt. The first had to be revised due to "several description errors." (H-1) Like Henderson's plan, Tanner's final plan came into being only after the legislative process had germinated for over six months. More

[7] Henderson had earlier submitted plans in October, 1977 (See Appendix page 5a of Petitioners' brief) and a first revision in February, 1978 (See Appendix page 12a of Petitioner's brief). The legislature was simply not in a position even to consider the Henderson plan prior to its final submission because of the drastic changes the plan had undergone. Comparison of the initial draft of the Henderson plan with the final revison reveals that 71 of the 122 house districts changed either in their configuration or in their statistics.

significantly, the Tanner Plan did not make its inaugural appearance until ten months after this Court's May, 1977, decision in the *Connor* litigation.[8] The record of the proceedings below, as detailed in Appendix A to Petitioner's own brief, reflects that it was not until after the lapse of more than a month — until the end of April — that all parties to the *Connor* litigation had filed their proposed reapportionment plans and their respective objections to the plans of party opponents with the court. Moreover, it was not until mid-May, 1978, that the Special Master had filed his proposed findings.[9] The parties were given an opportunity to comment on the Master's plans.

Only by June 5, 1978, then, had all parties to the litigation filed with the court their comments or objections to the plans of the Special Master. (Page 16a of the Appendix to Petitioners' brief). One week later, in an order filed on June 12, 1978, Respondents, having considered the proposed reapportionment plans of the parties, the proposals of the Special Master, and the objections of the parties thereto, made the observation that *"the differences among the various parties as to an appropriate reapportionment of the Mississippi Legislature are so narrow that they could easily be resolved among the parties."* (H-3) The Re-

[8] Analysis by reapportionment experts demonstrated that the Petitioners' plan (Henderson's) and the Department of Justice Intervenors' plan (Tanner's) contained deviations from absolute population equality of 122.72% and 53.02%, respectively, and thus were unusable from the standpoint of one-man-one-vote. (See paragraph 8 of affidavit of Thomas Hofeller, Appendix I-4).

[9] On May 3, 1978, the Special Master filed a plan for the reapportionment for the Mississippi Senate. On May 9, 1978, the Special Master suggested alternatives for certain districts in the plan he had filed 6 days earlier. On May 11, 1978, the Special Master submitted his revised plan for the Senate. On May 15, 1978, the court directed the Special Master to file a final proposal putting his plans for both the House and the Senate into final form. On May 18, 1978, the Master filed his final plan for the reapportionment of the Mississippi Legislature in response to the court's order of May 15. (B-14-15).

spondents thereupon ordered the parties to meet in settlement conference within 15 days to explore every reasonable possibility for entry of a consent decree which would terminate the litigation. (H-3-4)

More than two months prior to the Respondents' order directing the parties to explore settlement, the legislature had enacted legislative reapportionment plans for the Mississippi Senate and House (S.B. 3098 and H.B. 1491, respectively) which were based exclusively on single-member districts for both the House and Senate and utilized precinct lines in lieu of ED lines. The Governor of Mississippi, before signing the bills into law, sought input from black organizations, including the NAACP. In addition, Mississippi Senate and House (S.B. 3098 and H.B. 1491, the Governor sought the view of his cabinet-level multicultural advisory committee with regard to impact of the proposed plans on minorities. His efforts surfaced no complaints from the black community regarding the plans before him for signature. (D-41-44) On April 21, 1978, the Governor of Mississippi approved and signed into law S.B. 3098 and H.B. 1491, the two bills now before the Section 5 Court. (B-14)

On June 1, 1978, S.B. 3098 and the H.B. 1491 were submitted to the Attorney General of the United States for Section 5 preclearance.[10] During the summer months of 1978, the statutory plans languished in the inner sanctum of the Department of Justice in Washington while the parties to the *Connor* litigation were attempting to resolve their differences and reach agreement on a compromise court-ordered plan.

By mid-summer of 1978, the Attorney General of Mis-

[10] The delay in making the submission from April 4, 1978, to June 1, 1978, was caused by the failure of the Department of Justice to make information in its files available. In the end, Mississippi proceeded with its application absent the desired information. (See the affidavit of Jerris Leonard, Esq., Appendix C).

sissippi, had become concerned that the attempts to fashion a reapportionment plan in the lawsuit before the three-judge court in Mississippi would harden and prevent full and fair consideration of Mississippi's statutory plans which were designed to accomplish that same purpose. With that specific intonement in mind, on July 26, 1978, he directed a letter to the Attorney General of the United States (F-5-7) providing, in pertinent part,

> In essence, Mississippi has come up with the best apportionment plan, in all respects, in the United States. It was crafted by experts, who had worked in legislative apportionment in other states and who were guided by the Office of the Attorney General of Mississippi and former Department of Justice Assistant Attorney General for Civil Rights, Jerris Leonard, retained by the legislature. The legislature followed the advice of the experts and its counsel. The members were instructed that no changes requested by them would be implemented when to do so would dilute unacceptable population variances from the computed norm.
>
> * * *
>
> Our present concern is that the lingering effect of differences between Mississippi and the Department of Justice during the apportionment litigation of the past and present not affect fair and impartial consideration of our Section 5 application. We feel that it may be too great a burden and place your Civil Rights Division in an awkward position if they are asked to make a determination on the acceptability of our statutory plan when embroiled in litigation on the same subject matter. This is so because to approve our Section 5 statutory plan, the Civil Rights Division would have to abandon the plan it has been vigorously advocating before the three-judge court in Mississippi.
>
> * * *
>
> We request a fresh prespective on our Section 5 submission. We respectfully request an opportunity to meet with you and have you decide whether the statu-

tory plan enacted by our legislature denies or abridges the right to vote of any citizen in Mississippi on account of race.

Although received in the Department of Justice on the 28th day of July, the letter never reached the Attorney General of the United States (F-1; F-7-8). Attorney General Bell, who may have been out of the country at the time the letter was received, returned prior to the time the Department of Justice decided to act adversely on Mississippi's submission and yet was not consulted.

On August 1, 1978, Mississippi's Section 5 submission was rejected by the Department of Justice on the ground that Mississippi had failed to show that the plan did not have the purpose or effect of discriminating on the basis of race or color. (B-17) On August 1, 1978, Mississippi filed suit before a three-judge district court in the United States District Court for the District of Columbia,[11] (hereinafter the "Section 5 court") pursuant to Section 5 of the Voting Rights Act of 1965, seeking a declaratory judgment that the Mississippi statutory plans (S.B. 3098 and H.B. 1491) do not have the purpose and effect of denying or abridging the right of any citizen in Mississippi to vote on the grounds of race or color. (B-17; G-3)

On August 2, 1978, the *Connor* Defendants filed a Motion to Withhold Announcement of Judgment by the Respondents pending resolution of Section 5 proceedings. (Petitioner's Appendix, p. 17a) The Defendants premised their motion on this Court's June, 1978, pronouncements in *Wise* v. *Lipscomb*, 98 S.Ct. 2493 (1978), and on earlier guidance in this Court's May, 1977, opinion in *Connor*. Mindful of the urgency of these parallel proceedings, however, the *Connor* Defendants — Plaintiffs in the Section 5 litigation in Washington — followed their motion for a

[11] *Mississippi* v. *United States, et al.*, Civil Action No. 78-1425.

stay in Mississippi with an August 12, 1978 motion in the Section 5 case for a speedy hearing on the merits, requesting therein a trial within 15 days of September 15, 1978. On August 21, 1978, the Section 5 court granted the request, requiring the Defendants to answer the complaint for declaratory relief by September 1, 1978, and setting a trial date of September 18, 1978. (G-3) On the opening day of trial, the court granted a motion to intervene by several black citizens and registered voters in the State of Mississippi who held themselves out generally as representatives of the same class sought to be represented by the *Connor* Plaintiffs, i.e., all black citizens and black registered voters of the State of Mississippi. Many of the named intervenors were also named plaintiffs in *Connor*. They employed as counsel, Frank Parker, Esq., who also represents the *Connor* Plaintiffs.

The trial consumed eight days during the period from September 18, through September 27, 1978. In order to expedite the proceedings, Plaintiff (Mississippi) took depositions during trial recesses. At the conclusion, the parties were directed to file post-trial briefs and proposed findings of fact and conclusions of law by October 31, 1978. All parties were thereafter given 15 days to respond to the briefs of opposing parties. (G-6) Arguments were set for January 16, 1979. As of this writing, the case has been fully tried, briefed, and argued and a decision by the court is believed imminent.

At the time the Section 5 suit was initiated, settlement negotiations pursuant to the June 12, 1978, Order of he *Connor* court were nearing a conclusion. (D-45-48) The parties had resolved many differences and had arrived at a plan, the so-called compromise plan, which was acceptable to both the *Connor* Plaintiffs (Petitioners) and the *Connor* Intervenor's (the United States) and which was *conditionally acceptable* to the legislature. The legislature's

reluctant acquiescence [12] was subject to obtaining assurances from the *Connor* Plaintiffs and Intervenors that the compromise plan would not be used by them in any way to prejudice Mississippi's position before the Section 5 court. When the Petitioners refused to enter into the compromise subject to such condition, settlement discussions reached an impasse.

Petitioners then filed a motion for entry of judgment on October 12, 1978. The motion and accompanying proposed order asked the Respondents to enter the compromise plan as their final judgment. The motion has not been ruled upon. The Respondents indicated, at a January 2, 1979, hearing that they would give the Section 5 court an unencumbered opportunity, pursuant to its statutory duty, to pass on the legislature's plans (S.B. 3098 and H.B. 1491). Failing such action by the Section 5 Court in time for the 1979 elections, the Respondents would then enter judgment.

These unfolding events have brought the original *Connor* parties, and now the three-judge tribunal below, once again before this Honorable Court for argument on allied issues.

[12] The legislature was informally surveyed in August concerning the compromise plan. Members were advised that the *Connor* court was suggesting that the alternative to agreement would be a court-imposed plan shrinking the size of the Senate from 52 to 45 and of the House from 122 to 90. Under the threat of this clearly unacceptable alternative, members of the legislature indicated a willingness to subscribe to the compromise plan, but only if it could be done without prejudice to Section 5 proceedings. (Statement of the Mississippi Attorney General, Appendix D-45-48).

ARGUMENT I

THE DEFERENCE SHOWN BY THE DISTRICT COURT TO SECTION 5 PROCEEDINGS BEFORE THE DISTRICT COURT IN THE DISTRICT OF COLUMBIA IS A PROPER EXERCISE OF DISCRETION CONSISTENT WITH THE TEACHING OF THIS COURT IN THIS AND IN OTHER CASES.

Petitioners unabashedly emphasize the passing of a year and a half since remand; accordingly they contend that the Respondents have failed to act promptly in response to the mandate of this Court. Petitioners set forth this fact almost as if they expected a ruling the day the Respondents received this Court's mandate in 1977. Defendant submits that the litigation below is far too complex for anyone, including this Court, to have anticipated a ruling close on the heels of the mandate. Statewide reapportionment by federal courts is always a cumbersome process, even when the only consideration is one-man-one vote. Indeed, the federal district court in Mississippi struggled for a decade with this one-man-one vote problem before concerns regarding the dilution of minority voting strength overlaid the picture. It was the *Connor* court's inability to fashion a plan consistent with one-man-one vote requirement which caused this Court to reverse Respondent's 1976 single-member district plan. *Connor,* 431 U.S. at 421. On remand, the added requirement of avoiding the dilution of minority voting strength and the failure of census enumeration district lines to coincide with Mississippi voting precinct lines have combined further to complicate the difficult task. Thus, to cope with the purely technical aspects of drawing a plan which is consistent with the constitutional requirements of one-man-one vote, which avoids dilution of black voting strength, which causes minimal voter confusion, and which makes sense within the geographical and historical context of the State of Mississippi, requires assistance from experts

on reapportionment and the Bureau of the Census, coupled with utilization of computer technology. (D-16-23; D-31)

In light of these factors, it is clear beyond cavil that the Defendants and Respondents have moved the matter forward expeditiously between the receipt of this Court's mandate on July 28, 1977, and October 12, 1978, when Plaintiffs filed their presently-outstanding motion for judgment.[13] Indeed, we do not here understand Petitioner to be complaining about any of the time consumed by the proceedings below prior to October 12, 1978, nor should Petitioner be heard to so complain.[14] Since October 12, the Respondents have acted to establish the district boundaries necessary to fill legislative vacancies which have occurred since the 1978 legislative session in order that elections to fill these vacancies for the 1979 session may be held. (H-5-6)

Respondents have, however, since October 12, 1978, deferred the entry of final judgment pending disposition of the Section 5 case. Defendants requested the Respondents, by motion of August 2, 1978, to defer entry of judgment pending resolution of the Section 5 case. Defendants believe, and will endeavor to demonstrate herein, that such deference for a limited period of time is a supportable act of judicial restraint consistent with the teachings of this Court in this and in other cases.

Upon remand in 1977, this Court reiterated and emphasized that,

> Legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. at 586, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally-mandated framework of substantial population equality. The federal courts, by contrast, possess no distinct mandate to compromise conflicting state apportionment policies in the people's name. In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. *Connor*, 431 U.S. at 414-15.

[13] The chronology of the proceedings below, summarized in our Counter-Statement of the Case and Statement of Facts, and set forth in detail in Appendix A, support this conclusion.

[14] Petitioners took from August, 1977 through March, 1978 to draw a plan (the Henderson plan), which turned out to be useless. (See the affidavit of Thomas Hofeller, Appendix I.)

This pronouncement is as much a part of this Court's mandate as that segment upon which Petitioners rely. Intervening events since May of 1977 have not made it at all clear at this time that the federal court must act "in the wake" of the legislature's failure to act. Indeed, the record shows that the legislature and the state's executive officers promptly expended extensive resources in response to the teachings of *Connor* in a good-faith effort to relieve the federal court of this "unwelcome obligation." Whether they have done so successfully will be known shortly.

The proposition that federal courts should make every effort *not* to preempt legislative bodies was underscored by this Court in June of 1978, in *Wise* v. *Lipscomb*, 98 S.Ct. 2493, 2497, citing *Connor, supra* as precedent. This Court then stated in *Wise* that, "whenever practicable [the federal court should] afford a reasonable opportunity for the legislature to meet constitutional requirements rather than . . . to devise *and order into effect* its own plan." *Id.* at 2497. (emphasis added).

Respondents have followed this teaching, observing,

> We think that under the decision of the Supreme Court in *Wise v. Lipscomb*, which was handed down only last June, that it is our duty to give the right-of-way to

> any legislative, statutorily enacted plan. We think the decision says that as plain as it can possibly say it. And the Legislature, of course, has enacted a plan. It is now under submission to a District Court in the District of Columbia, as the law also provides for. And purely on the authority of *Wise v. Lipscomb*, and without further arguing the matter but explaining it in the record, purely on that basis we've been waiting to see what the District Court in the District of Columbia would do about the legislative plan. (Page 7 of transcript of January 2, 1979, hearing, cited at H-5).

On October 12, 1978, when the Petitioners finally made a motion for judgment, the Respondents were aware that trial of the Section 5 case had concluded. The Respondents, at that time, could hardly have been oblivious to the massive effort undertaken by the State to formulate a modern and progressive statewide reapportionment plan and to obtain clearance under Section 5 for that plan. (In addition to the highly-publicized nature of the effort, the detailed chronology had been placed before the court in support of the Motion to Withhold Judgment. [Appendix B]) Thus the Respondents must have been cognizant of the legislature's desire to apportion itself, of the Governor's interest, of the retention of outside counsel with an eminent record of civil rights advocacy, of the retention of outside and impartial technical expertise on reapportionment, of the opportunity for public involvement in the creation of the statutory plans, and of the use of extensive computer technology and assistance from the Census Bureau, which itself characterized the entire effort as thorough, fair, and, above all, professional.

The legislature's reapportionment effort was the first since the *Connor* litigation began which endeavored to formulate an entire plan rather than to modify or adopt plans previously promulgated by a federal court. Further, it was the first legislative reapportionment effort in which the legislature relied exclusively on single-member districts,

and fractured county lines where necessary to meet the one-man-one vote requirement. It was also the first time Mississippi sought assistance of legal counsel and experts from outside Mississippi to advise and participate in a reapportionment effort.

Following this extraordinary undertaking by its legislature, Mississippi has made every effort to expedite Section 5 proceedings in order to realize the fruits of its good-faith effort. Mississippi filed suit seeking declaratory relief the very day it received notice that its submittal to the Attorney General of the United States had not resulted in Section 5 clearance from that office. (B-17; G-3) It moved to expedite the proceedings, requesting a shortened pleading period and early trial date. Every step it has undertaken has been in pursuit of an early disposition. To the contrary, the United States, the Defendant in the Section 5 case and Intervenor below, has attempted to delay the Section 5 proceedings. After taking the full 60 days to review the plan administratively,[15] the United States pled, in papers filed with the Section 5 court seeking reconsideration of that court's August 21, 1978 Order [16] expediting the proceedings, that

> It would be appropriate for this Court to stay the hearing on the merits of plaintiff's request for declaratory relief until a final ruling by the *Connor* court so that

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[15] One of the issues before the Section 5 court is that the administrative review was not meaningful and thus creates no adverse inference to the validity of the proposed plans. Technical review of the complex reapportionment plan was delegated by the Department of Justice to a second-year law student whose background in reapportionment was so limited that he failed to qualify as an expert when offered as a witness during trial of the Section 5 case. (D-44). The Attorney General was never consulted on the matter and the Assistant Attorney General for Civil Rights never read Mississippi's submission. (F-1-2).

[16] See page 1 of the docket sheet at page G-4 of the Appendix.

the statutory plan before this Court may be compared with the plan approved in that litigation. (G-9)

It is our view that the United States sought this delay because it shares Petitioners' preference for reapportionment by court decree to reapportionment by the legislature. Aaron Henry, Chairman of the Mississippi NAACP and Defendant-Intervenor in the Section 5 case, admitted during sworn testimony in the Section 5 proceedings, that if he had two acceptable and *identical* plans, one before a federal court and the other before the legislature, he would prefer enactment of the plan by judicial fiat. (D-48-50)

The Section 5 court, nevertheless, adhered to its decision to expedite the matter. By the time the *Connor* court received Petitioners' Motion for Judgment, the taking of evidence in the Section 5 case had concluded and the parties were in the final stages of preparing post-trial briefs. Had the Respondents decided to enter judgment at that point, a reopening of the record in the Section 5 case might have occurred, injecting a new issue which could have had the effect of delaying a decision by the Section 5 Court.

If there existed major differences between the plan desired by Petitioners in their Motion for Judgment in *Connor* and the statutory plan before the Section 5 court with respect to the treatment accorded black voters, there might be some justification for the instant application.[17] A comparison of the treatment accorded black voters in the *Connor* compromise plan with H.B. 1491 and S.B. 3098 before the Section 5 court, however, reveals little, if any,

[17] Without the imprimatur of judicial decree, the compromise plan was placed in evidence before the Section 5 court, FED.R.EVID. 408 notwithstanding.

difference of significance.[18] Indeed, the plans are so similar in the configuration of districts throughout the State that it seems incredible that anyone would suggest that one set of plans is constitutional and meets Section 5 while the other fails in both respects.

The *Connor* compromise plan is in fact nothing more than a fine tuning of the statutory plans in certain limited areas of the State, designed to bring into better focus the political needs of certain blacks who desire to enhance their own political ambitions, and does not result in a substantial enhancement of the political position of blacks in the state as a whole. According to the experts of the Department of Justice, any district below 60% black voting age population (VAP) does not provide a black candidate a viable chance of being elected.[19] Districts below this number in black VAP percentage become simply "influence" districts. The table in footnote 18 demonstrates that the compromise plan and the statutory plan both contain the same number, sixteen (16), of 60% black VAP districts in the 174 seat legislature (adding the House seats above 60% to the Senate seats above 60%). Nor is there any appreciable gain in black majority VAP districts in the compromise plan. The compromise plan realizes a

[18]

	NO. OF HOUSE SEATS		NO. OF SENATE SEATS	
% Range of Black Voting Age Population	Connor Court Compromise	Section 5 Court H.B. 1491	Connor Court Compromise	Section 5 Court S.B. 3098
50-100%	28	26	11	10
55-100%	22	20	7	7
60-100%	15	14	1	2

This table is based on data obtained from a table at page 6a of Defendant-Intervenors proposed findings of fact in the Section 5 case.

[19] Pages 27 and 28 of the brief of the United States in the Section 5 case.

net gain of three (3) such districts when compared with the statutory plan. This difference, according to the Assistant Attorney General of the United States for Civil Rights, is not significant enough to suggest an improper purpose under Section 5.[20] Neither the Constitution nor Section 5 has ever been held to cut so finely as to distinguish between two plans substantially similar in overall configuration with such negligable, if any, differences in the treatment accorded minority groups.

At a time when elections are not imminent, were the *Connor* Court to announce a court-ordered reapportionment plan which was subsequently superseded by approval of the statutory plan before the Section 5 court, there would necessarily be confusion of voters and unfairness to candidates attempting to qualify for the 1979 quadrenial elections.[21]

The Respondents' evident desire to avoid this unpleasantness is both understandable and justifiable. The District Court in Mississippi has before it a plan which it knows is acceptable to the United States and to the Petitioners here. Respondents have reason to believe that if they enter that plan as their court-ordered plan, those parties would not appeal from such judgment. Further, Respondents know that the plan closely resembles the legislature's statutory plans, having been derived therefrom, and thus appeal by the Defendants is unlikely. Respondents are thus in a position to await, for a reasonable time, final action by the Section 5 Court without real concern that their decision will be attacked on appeal.

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[20] Assistant Attorney General Days deposition was taken in the Section 5 case. The pertinent testimony at pages 112-115 of the deposition is reproduced at pages F-1-4 of the Appendix.

[21] As the Petitioners concede in their brief at the top of page 17, Section 5 clearance of the statutory plan would supersede any plan ordered by the district court in Mississippi. Thus, candidates who announced and qualified pursuant to a court-ordered plan would need to requalify under the statutory plan.

This Court might inquire as to why Defendants continue to pursue the statutory plan in view of the contention here that the differences between the so-called compromise plan and the statutory plan are *de minimus*. Conversely, the Court might inquire why the United States and Petitioners urge the compromise plan on the *Connor* court but oppose Section 5 clearance of the statutory plan. The legislature's answer lies in Mississippi's strongly-felt desire once and for all to escape from the aegis of federal court decree in apportionment matters and to proceed to conduct future elections under plans formulated with the political authoritativeness of its own legislature, a power enjoyed by the other 49 states. Mississippi desires to repose the matter of reapportionment in its legislature where it belongs and to demonstrate that it has not only the ability, but also the desire to comply with this Court's pronouncements on constitutional requirements applicable to legislative apportionment. On the other hand, as previously noted, the testimony is clear that members of the class Petitioners purport to represent prefer a plan enacted by judicial decree rather than having its virtual twin enacted by the legislature. (D-48-50)

ARGUMENT II

THE GRANTING OF THE MOTION AND THE ISSUANCE OF THE WRIT WOULD BE INAPPROPRIATE.

Defendants submit that granting the motion and issuing the writ of mandamus would be inappropriate in this action. Defendants entertain no doubt that this Court has the power to direct the district court to proceed to judgment in a pending case " 'when it is its duty to do so'. . . [but the] moving party [must] satisfy the burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 2559

(1978) quoting *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943), and *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953).[22]

This Court is on record holding that,

> Where a matter is committed to the *discretion* of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' *Will v. Calvert Fire Ins. Co., supra,* 2559 (emphasis added)

The decision by the Respondents to defer to the Section 5 court for a reasonable period of time was clearly an exercise of *discretion* "appropriate for disciplined and experienced judges." *Kerotest Mfg. Co.* v. *C-O Two Fire Equipment Co.*, 342 U.S. 180, 184 (1952), *a fortiori*, the right to issuance of the writ is not "clear and indisputable." Further, ". . . a litigant's right to proceed with a duplicative action in a federal court can never be said to be 'clear and indisputable.' " *Will* v. *Calvert Fire Ins. Co., supra,* fn 8.

It is our view that this Court should not review via mandamus the interlocutory and discretionary decision by the Respondents below to defer to another federal court whose decision in the matter could end the case before them; we believe Respondents properly exercised their discretion. Confronted with the teaching of *Wise, supra,* the Respondents, had they not stayed their hand in the circumstances outlined in Argument I above, i.e., pending Section 5 action, they could have been successfully charged with error. The Respondents' exercise of discretion to defer

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[22] This Court has never departed from the admonition that, "Mandamus prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy * * * As extraordinary remedies they are reserved for really extraordinary cases. *Ex parte Fahey,* 332 U.S. 258, 259-60 (1947).

entry of judgment is butressed, by implication, by the Section 5 court's decision to proceed expeditiously rather than defer to a decision by the Respondents as requested by the United States.

Certainly, if a United States district court can defer adjudication of purely federal rights to a parallel state court proceeding, *Will* v. *Calvert Fire Ins. Co., supra,* then surely a federal district court can defer to another federal district court — whose decision may be preemptive and thus make further litigation of the question before the deferring court unnecessary. We suggest to this Honorable Court that under the facts of this case, the Respondents not only had the discretion but also the duty, pursuant to the teachings of this Court in *Wise* and *Connor,* to defer to the Section 5 court for a reasonable time. The Respondents have made it crystal clear that they will enter judgment when, in their discretion, imminence of the 1979 elections makes it impracticable to do otherwise, or indeed, earlier if it becomes apparent that Mississippi's request for declaratory relief has not borne fruit. As this Court noted in *Landis* v. *North American Co.*, 299 U.S. 248, 256 (1936),

> We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppresive in its consequences if the public welfare or convenience will thereby be promoted.

Given the negligible difference in the treatment of black voting strength between the Compromise Plan before Respondents and the Statutory Plan before the Section 5 Court, and the confusion that would prevail should two different federal courts enter judgments which have the appearance of permitting implementation of two different apportionment schemes for the 1979 quadrennial elections in Mis-

sissippi, Respondents' determination to give the legislature a reasonable opportunity to pursue Section 5 preclearance before assuming the "unwelcome obligation" of apportioning the state themselves is not so clearly an abuse of discretion that the relief sought by Petitioner should be granted.

CONCLUSION

For the reasons set forth herein, the Defendants respectfully request that the Petitioner's motion for the issuance of a writ of mandamus be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1013

PEGGY J. CONNOR, HENRY J. KIRKSEY, ET AL.,
Petitioners,

v.

HONORABLE J. P. COLEMAN, United States Circuit Judge, HONORABLE DAN M. RUSSELL, JR., United States District Judge, HONORABLE HAROLD COX, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
Respondents.

REPLY BRIEF FOR PETITIONERS

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IN THE

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Respondents.

REPLY BRIEF FOR PETITIONERS

On May 31, 1977, this Court directed the three-judge District Court in *Connor* v. *Finch* to devise a new constitutionally sound court-ordered reapportionment plan "with a compelling awareness of the need for its expeditious accomplishment," *Connor* v. *Finch*, 431 U.S. 407, 426 (1977). In response to their failure to comply expeditiously with this mandate, the respondent Judges in their brief allege (1) that the promulgation of a court-ordered plan by the District Court would cause confusion if the legislature's 1978 statutory plan [1] subsequently gains the approval of the District Court for the District of Columbia in the declaratory judgment action

[1] The Legislature's 1978 statutory plan was enacted in April, submitted to the Attorney General in June pursuant to § 5 of the Voting Rights Act, and the Attorney General lodged an objection to that plan based on dilution of black voting strength on July 31, 1978 (Brief for Petitioners, Appendix C).

brought pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, (Response of the Judges, p. 4) and (2) that the deference to legislatively-enacted plans reiterated in *Wise* v. *Lipscomb*, 46 U.S.L.W. 4777 (U.S. June 22, 1978) (No. 77-529), requires the District Court to stay its hand, (Response of the Judges, pp. 5-6). The respondents further state that they would place a court-ordered plan into effect if (1) the District Court for the District of Columbia disapproves the Mississippi Legislature's statutory plan, apparently even if an appeal is taken by the State, or (2) if the District Court for the District of Columbia fails to decide the § 5 declaratory judgment action by May 7 (Response, p. 5).[2]

The reasons given by the District Court for staying judgment on a court-ordered plan are inadequate as a matter of law to justify a stay of judgment after more than a year and a half of proceedings on remand in the District Court. First, no confusion would ensue if the judgment on the court-ordered plan clearly states, as prior judgments have stated, that the court-ordered plan would remain in effect only until superseded by a constitutionally sound and § 5-approved legislative plan. Indeed, such alleged confusion would be further minimized if the District Court were to order into effect the district boundaries agreed to by the parties in the *Connor* settlement plan, since that plan is based to a large extent

[2] On January 2 and January 18, 1979, after our Motion for Leave to File and Petition was filed, the District Court entered orders providing for the filling of five vacancies in the Mississippi Senate and House of Representatives from piecemeal single-member districts carved out of the multi-member districts used in the 1975 court-ordered plan. Copies of those orders are attached hereto. These orders show that piecemeal, *ad hoc*, one-time-only districts are no substitute for a constitutional statewide plan, and that a constitutional statewide plan is long overdue. One vacancy in the House of Representatives still exists created by the election of Representative William Canon to the Senate in the January 27 special election in Lowndes County.

on the statutory plan and retains intact the vast majority of the districts contained in the statutory plan (Brief for Petitioners, p. 10 n. 2).

Second, while *Wise* counsels deference to a valid legislative plan, *Wise* also charges that no such deference is due to a legislative plan which has not been precleared pursuant to § 5 of the Voting Rights Act:

> "A new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered "effective as law," *Connor* v. *Finch*, *supra*, at 412; *Connor* v. *Waller*, 421 U.S. 656 (1975), until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure. *Connor* v. *Finch*, *supra*; *Connor* v. *Waller*, *supra*. Pending such submission and clearance, if a State's electoral processes are not to be completely frustrated, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans." *Wise*, *supra*, at 4779.

Thus, the District Court's tardy failure to comply with the explicit mandate of this Court is based upon a fundamental misreading of this Court's opinion in *Wise* v. *Lipscomb* which, in its discussion of the duties and responsibilities of the District Court in a § 5-covered jurisdiction, holds just the opposite of what the respondents argue.

The District Court should be directed to enter its court-ordered plan now in order to protect and preserve the rights of the parties to appellate review of that plan prior to the 1979 state legislative elections. The May 7 deadline suggested by the District Court as the fail-safe date after which the District Court would order into

effect a court-ordered plan simply does not provide enough time for an effective appeal to this Court by any aggrieved party. May 7 is only thirty days prior to the qualifying deadline for legislative candidates (Response of the Judges, p. 5). The last appeal in this case—ordered expedited by this Court—took more than six months to complete. Plaintiffs' notice of appeal was filed the same day the final judgment was entered, November 18, 1976. This Court then ordered an expedited briefing schedule and expedited oral argument: briefs on the merits were ordered filed by February 7, 1977, responsive briefs were ordered filed on February 21, and oral argument was ordered for February 28. *Connor* v. *Finch*, 429 U.S. 1010, 1060 (1977). The Court's opinion was announced May 31.

Further, oral arguments of cases heard during the Term normally are completed in April. Last Term the Court adjourned on July 3. 46 U.S.L.W. 3803. Thus, it is extremely unlikely that if the District Court orders its plan into effect sometime after May 7, 1979 that any aggrieved party would be able to obtain appellate review of that plan in this Court prior to the June 7, 1979 qualifying deadline or the August 7, 1979 legislative primary elections.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3830(A)

[Filed January 2, 1979]

PEGGY J. CONNOR, ET AL.
Plaintiffs

and

UNITED STATES OF AMERICA
Plaintiff-Intervenors

vs.

CLIFF FINCH, ET AL.
Defendants

CONSENT ORDER

By stipulation and agreement of the parties, it is

ORDERED, ADJUDGED, AND DECREED:

That special elections to fill vacancies in the Mississippi Legislature to be ordered by the Governor of Mississippi shall be ordered in the manner and within the time provided by Mississippi law in the following districts as defined herein:

Senate Dist.	Components	Pop.	Black Pop.	% Black Pop.
6	LOWNDES COUNTY: All except Air Base Precinct	43,077	15,508	36.00
	Deviation from Norm: +1.04%			
15A	HOLMES COUNTY: All MADISON COUNTY: Beat 1 Beat 4 Beat 5 YAZOO COUNTY: Beat 4			
	TOTALS DISTRICT 15A	45,726	30,972	67.73
	Deviation from Norm: +7.25%			
House Dist.				
28	MADISON COUNTY: Beat 1 Beat 4 Beat 5			
	TOTALS DISTRICT 28	19,853	13,351	67.25
	Deviation from Norm: +9.26%			

ORDERED ADJUDGED AND DECREED on this the 2nd day of January, 1979.

/s/ Jas. P. Coleman
United States Circuit Judge

/s/ Dan M. Russell, Jr.
United States District Judge

/s/ Harold Cox
United States District Judge

AGREED AND STIPULATED TO:

/s/ Frank R. Parker
Attorney for the Plaintiffs

/s/ A. F. Summer
Attorney for Defendant

/s/ Jeremy L. Schwartz
Attorney for Plaintiff Intervenor

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3830(A)

[Filed January 2, 1979]

PEGGY J. CONNOR, ET AL.,
Plaintiffs

UNITED STATES OF AMERICA,
Intervenor
v.

CLIFF C. FINCH, ET AL.,
Defendants

DECREE PROVIDING FOR THE FILING OF A VACANCY IN THE MISSISSIPPI STATE HOUSE OF REPRESENTATIVES WHICH HAS OCCURRED IN DISTRICT 30

This day this three-judge Court was convened, on adequate notice to the parties, to determine how a vacancy in the Mississippi House of Representatives from District 30 should be filled pursuant to a vacancy being caused by the resignation of Representative George Rogers.

Counsel for all parties were present and appeared in open court and made their representations to the Court as to how this vacancy might be filled.

Having heard these representations and having conferred on the matter

IT IS NOW ORDERED, ADJUDGED AND DECREED that the vacancy in District 30 for the election of representatives in the Mississippi Legislature occasioned by the resignation of Representative George Rogers shall be filled as follows:

The Supreme Court of the United States having previously adjudicated that this Court may no longer order elections for multiple-member legislative districts in this state, District 30 as established in our prior decree for the election of legislators in the year 1975 shall be divided into three segments which hereafter shall be known as District 30, District 30A, and District 30B, as follows:

District	Components	Unit Pop.	County Pop.	Black Pop.	% Black Pop.
30	Claiborne County: All		10,086	7,522	74.58
	Warren County: Precincts of Redbone, Yokena, Jett & No. 7 Fire Station	8,794	8,794	2,598	29.54
	TOTAL DISTRICT 30		18,880	10,120	53.60
	Deviation: +3.90				
30A	Warren County: Precincts of Goodrum, Jonestown, Tingle, Beechwood, Culkin, Bovina, Oak Ridge, Redwood, Cedar Grove, King	18,539	18,539	5,298	28.57
	Deviation: +1.44				
30B	Warren County: Precincts of Walters, Brunswick, St. Aloysius, Auditorium, American Legion & Central Fire Station	17,643	17,643	10,459	59.28
	Deviation: —2.9				

Representative Cross, who was elected in 1975, is presently a resident of District 30. Representative Beulow, who was elected in 1975, is presently a representative of District 30A.

Therefore, a special election shall be called as speedily as possible consistent with the requirements of the applicable provisions of the Constitution of Mississippi and the statutes of said state in District 30B for the election of one member of the House of Representatives who shall serve until January 1, 1980.

The Court wishes it distinctly understood that the sole and only purpose of this decree is to fill a vacancy existing in District 30 as established in 1975 and it is not intended to have, nor does it have, any relevance in any state-wide Court ordered legislative plan which this Court may hereafter adopt, if it should become necessary that the Court enter such a plan. Our purpose is to fill a vacancy existing in a district as established in 1975 and in order that the district court may have the representation to which it is entitled in the presently sitting session of the Mississippi legislature.

This plan does not meet with the approval of all of the parties to this litigation and is intended by the Court in the discharge of its responsibilities in the premises.

SO ORDERED, ADJUDGED AND DECREED at Jackson, Mississippi on this January 2, 1979.

/s/ Jas. P. Coleman
United States Circuit Judge

/s/ Dan M. Russell, Jr.
Chief Judge
United States District Court

/s/ Harold Cox
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3830(A)

[Filed January 18, 1979]

PEGGY J. CONNOR, ET AL.,
Plaintiffs,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

—VS.—

CLIFF FINCH, ET AL.,
Defendants,

ORDER DIRECTING SPECIAL ELECTION TO FILL A VACANCY IN THE MISSISSIPPI HOUSE OF REPRESENTATIVES

Before COLEMAN, Circuit Judge, RUSSELL, Chief District Judge, and COX, District Judge.

PER CURIAM:

It being made known to the Court that Jimmie Ray McCalla has resigned his seat from District 1B in the Mississippi House of Representatives

IT IS ORDERED, ADJUDGED, AND DECREED that said vacancy shall be filled by an election to be held from a District described as follows:

Dist. No.	Components	Population	% Variance	% Black Population
1B	ALCORN COUNTY:			
	All except the Precincts of Glen, Farmington, East Corinth, Rienzi, Biggersville, Bethel, Jacinto, and Union	17,273	—4.94	13.37

The Clerk will provide a certified copy of this Order to Counsel for parties to this litigation and to the Governor of Mississippi, whose function it is to set the date for a special election to fill the vacancy.

A copy of this Order will likewise be furnished the Circuit Clerk of Alcorn County, Mississippi, for the use of the Election Commissioners in said County when the Governor shall have called said special election.

SO ORDERED, ADJUDGED, and DECREED, this the 16 day of January, 1979.

/s/ Jas. P. Coleman
United States Circuit Judge

/s/ Dan M. Russell, Jr.
Chief
United States District Judge

/s/ Harold Cox
United States District Judge

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1013

PEGGY J. CONNOR, HENRY J. KIRKSEY, ET AL.,

Petitioners,

v.

HONORABLE J. P. COLEMAN, United States Circuit Judge, HONORABLE DAN M. RUSSELL, JR., United States District Judge, HONORABLE HAROLD COX, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,

Respondents.

RESPONSE TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS, AND BRIEF IN SUPPORT THEREOF

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APPENDIX

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APPENDIX A

HISTORY OF PROCEEDINGS PRIOR TO 1975 COURT TEMPORARY PLAN

Judicial review of the apportionment of the Mississippi state legislative districts [1] began over ten years ago when the three-judge district court invalidated as unconstitutional the apportionment as it then existed. *Connor v. Johnson*, 256 F.Supp. 962 (S.D. Miss. 1966). A reapportionment plan promulgated by the legislature in 1966 was also found to be unconstitutional by the same three-judge district court which proceeded to enter a decree reapportioning the legislative districts for the 1967 elections. *Connor v. Johnson*, 265 F.Supp. 492 (S.D. Miss. 1966). There was no appeal from either of these decisions.

Using 1970 census data, the legislature passed a reapportionment plan for use in the 1971 elections.[2] The 1971 legislative reapportionment plan was invalidated for containing impermissible population variances by the three-judge district court which had retained jurisdiction. A reapportionment plan for the 1971 election was formulated and decreed by the district court. *Connor v. Johnson*, 330 F.Supp. 506 (S.D. Miss 1971). The district court held its action was "for the purpose of complying with the one-man-one vote requirements of the United States Constitution involving no racial discrimination in the exercise of the franchise under the Fifteenth Amendment." *Connor v. Johnson, supra*, 330 F.Supp. at 519. Recognizing the integrity of county boundaries,[3] the district court created

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[1] The Mississippi legislature is bicarmeral. There are 122 House seats and 52 Senate seats.

[2] Election of the state legislature occurs every four years in Missisippi.

[3] Mississippi has 82 counties widely disparate in population.

multi-member districts, rather than fractionalize county lines. *Id.* at 518. The three largest counties, Hinds, Harrison and Jackson, respectively elected twelve, seven and six representatives at-large. Addressing itself to these three counties the district court stated,

> When, however, a county, within its own borders, elects four or more representatives it would be ideal if it could be divided into districts, for the election of one member to the district. *Id.* at 519.

Nonetheless, the district court declined to divide Hinds, Harrison and Jackson Counties into single member districts finding that

> [I]t is a matter of sheer impossibility to obtain dependable data, population figures, boundary locations, etc. so as [to] fairly and correctly divide these counties into districts for the election of single members of the Senate or the ouse in time for the elections of 1971. *Id.* at 519.

The district court stated that it intended to appoint a special master to determine the feasibility of dividing Hinds, Harrison and Jackson Counties into districts of substantially equal numbers in population for the 1975 and 1979 elections. The district court therefore retained jurisdiction over those three counties. The reapportionment plan *"as to all other Counties [was] final* and subject to no further review" by the district court. *Connor v. Johnson, supra* 330 F.Supp. at 519 (emphasis in original).

Plaintiffs motioned this Court to stay the district court's order and extend the deadline for filing notices of candidacy until single-member districts were created in Hinds County. In their motion, plaintiffs stated to this Court that they were able to formulate four single-member district plans for Hinds County in the space of three days. *Connor v. Johnson,* 402 U.S. 690, 692 (1971). This Court held "that

when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Id.* at 692. In view of "the dispatch with which the [plaintiffs] devised suggested plans" and the apparent availability of census information, this Court granted the motion for a stay until June 14. The district court was instructed "absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County" by June 14, 1971. *Id.*

Within forty-eight hours of this Court's order, the district court held a hearing for the purpose of complying. *Connor v. Johnson,* 330 F.Supp. 521, 522 (S.D. Miss. 1971). At the hearing, *"plaintiffs readily conceded that the plan originally submitted to [the district court] by plaintiffs, and later filed with the Supreme Court, was based on an erroneous precinct map." Id.* at 522.[4]

The district court concluded that it was "confronted with insurmountable difficulties against the division of Hinds County" into single-member districts for the 1971 elections. *Connor v. Johnson, supra,* 330 F.Supp. at 523. Plaintiffs

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[4] The district court on June 8, 1971, appointed William D. Neal as Special Master to propose by June 14 "a valid plan, if such be possible, for the division of Hinds County as directed by Supreme Court." *Connor v. Johnson, supra,* 330 F.Supp. at 524. The Special Master in examining available data found "that the census figures available for the accomplishment of the task were limited to figures tabulated by 'census enumeration districts' and that these districts were rarely coterminous with individual precinct lines." *Id.* at 527. Regarding plaintiffs' proposals, the Special Master concluded that they were "unusable for the election of Representatives and Senators. The proposals were found to have so many basic defects" that the Special Master recommended "that the plans be rejected in their entirety." *Id.* at 526. The Special Master recommended that the 1971 election of senators and representatives from Hinds County be conducted in the manner directed by the district court in *Connor v. Johnson, supra,* 330 F.Supp. 506. *Id.* at 528.

sought a further stay which this Court denied on June 21, 1971. *Connor v. Johnson*, 403 U.S. 928 (1971).

After the 1971 elections were held, plaintiffs appealed.

This Court declined to disturb the 1971 elections and withheld a determination as to the prospective validity of the district court plan for the 1975 elections.[5] *Connor v. Williams*, 404 U.S. 549, 550 (1972).

This Court observed that in the meanwhile the legislature might adopt a reapportionment plan which would make it unnecessary for the district court to develop a plan. *Id.* at 552, fn. 4.

Following this Court's decision in *Connor v. Williams*, *Id.* the legislature established a Joint Legislative Reapportionment Study Committee authorized to formulate guidelines and consider and make proposals for reapportionment. In view of this Court's repeated emphasis that " 'legislative reapportionment is primarily a matter for legislative consideration and determination. . .' " *id.* at 552, fn. 4, the district court by Order of Deferment referred the matters relating to Hinds, Harrison and Jackson Counties to the legislature which was then in session.

On February 9, 1973, the Governor approved reapportionment plan, H.B. 446, and Senate reapportionment plan,

[5] The Court ruled that Hinds, Harrison and Jackson Counties' multimember districts were temporary and that the district court had retained jurisdiction over those three counties to determine whether they may feasibly be divided into districts of substantially equal numbers in population for the elections of 1975 and 1979. Pending completion of those proceedings, the Court deemed it inappropriate to give further consideration to the case. *Connor v. Williams, supra*, 404 U.S. at 551. The district court's judgment was vacated so that when a final judgment was subsequently entered plaintiffs' right to appeal would be preserved. *Connor v. Williams, supra*, 404 U.S. at 552.

S.B. 1701. These plans established within Hinds, Harrison and Jackson Counties single-member districts as well as small floterial districts. The plans retained for the remaining counties in the State the legislative districts established by the district court in its 1971 plan. Shortly thereafter, this Court in *Mahan v. Howell*, 410 U.S. 315 (1973), approved the maintenance of the integrity of political boundaries in legislative reapportionment. The legislature, then superseded its three-county plan by enacting H.B. 1389 and S.B. 2452, Miss. Legis., 1973 Reg. Sess. These enactments, approved by the Governor on April 6, 1973, and submitted to the district court, readopted for Hinds, Harrison and Jackson Counties the plan initially formulated by the district court in 1971.

On March 13, 1973, the district court had directed plaintiffs to file any objections to the three-county plan by April 20, 1973. Plaintiffs on April 19, 1973, filed their objections to the reapportionment plan. Two days earlier, on April 17, 1973, plaintiffs filed in the district court a motion for continuance so that they could prepare and submit an alternative single-member district plan for the entire State, not just Hinds, Harrison and Jackson Counties. Over a year later, on April 26, 1974, plaintiffs motioned for leave to file a supplemental complaint challenging the entire State reapportionment plan and finally submitted an alternative reapportionment plan. The district court entered an order on May 10, 1974, denying plaintiffs' motion for leave to file a supplemental complaint.

On January 27, 1975 this Court had decided *Chapman v. Meier*, 420 U.S. 1, reiterating that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Id.* at 27.

On February 7, 1975, the three-judge district court held

a hearing to consider the constitutionality of the 1973 legislation.

"Heeding the teachings of *Meier*, [the court] delayed a decision on the 1973 Acts to see if they were to be replaced by a 1975 legislative enactment." *Connor v. Waller*, 396 F.Supp. 1308, 1311 (S.D. Miss. 1975). The Legislature did enact reapportionment bills, H.B. 1290, S.B. 2976, Miss. Legis. 1975 Reg. Sess., which were approved by the Governor on April 7 and 8, 1975.

Accordingly, on April 10, 1975, the district court dismissed all prior proceedings without prejudice and directed the plaintiffs to file amended complaints addressed to the 1975 reapportionments Acts. An amended complaint was filed and a hearing was held on May 7, 1975. On May 19, 1975, the district court approved the proposed plan. *Connor v. Waller, supra.*

In approving the reapportionment plan, the district court found to be fact that the preservation of the integrity of county lines has been a policy of Mississippi since it became a state in 1817; the State Legislature acted in good faith in reapportioning and attempted to comply with the constitutional requirements; the plan complies with as nearly as practicable the standards of the one-person-one vote rule as enunciated by the Supreme Court; any variances from the population norm were reasonable, unavoidable, and constitutionally justifiable; the reapportionment plan will not deprive any person of fair and effective representation; and the plan does not unconstitutionally minimize or cancel out black voting strength for the election of the Mississippi Legislature. *Connor v. Waller, supra,* 396 F.Supp. at 1321, 1322.

Thus, for the first time in this litigation epic, racial dilution became a central issue. (Supp. App. 75a). The decisions prior to *Connor v. Waller, supra,* 396 F.Supp. 1308, had dealt exclusively with the issue of one person-one vote.

On June 5, 1975, this Court reversed the district court, holding that the legislative enactments were required to be submitted pursuant to §5 of the Voting Rights Act of 1965, 79 Stat. 439 *as amended*, 42 U.S.C. §1973c. *Connor v. Waller*, 421 U.S. 656 (1975). Since the Acts could not be effective as laws until cleared pursuant to §5, the district court was held to have erred in deciding the constitutional challenge to the Acts based upon claims of racial discrimination.

The reversal was without prejudice to the district court's authority to require, if appropriate, the holding of the 1975 legislative elections pursuant to a court-ordered plan that complied with this Court's decisions in *Chapman v. Meier*, 420 U.S. 1 (1975); *Mahan v. Howell*, 410 U.S. 315 (1973); and *Connor v. Williams*, 404 U.S. 549 (1972). *Connor v. Waller, supra,* 421 U.S. at 656. Thereafter, on June 9, 1975 Mississippi submitted the 1975 legislation to the Attorney General of the United States in compliance with Section 5 of the Voting Rights Act of 1965. 42 U.S.C. 1973. The Attorney General objected to the plan on June 10, 1975 and accordingly the district court held a hearing to formulate a court plan for the 1975 elections.[6]

On June 11, 1975, the United States motioned to intervene as a party plaintiff, which motion was granted by the district court (App. Vol. I, 22). On June 20, 1975, the district court held a hearing to consider plaintiffs' motion for injunctive relief and defendants' petition for a writ of mandamus.[7] Since the 1975 legislative reapportionment

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[6] We note here that it took the Attorney General one day to do in 1975 what he barely accomplished, if at all, in sixty days in 1978.

[7] The State defendants prayed that a Writ of Mandamus issue to the Attorney General of the United States requiring him to act in accordance with his official "deferral policy" cited with approval in *Georgia v. United States* 412 U.S. 526 (1973).

Acts had not become effective as laws, the district court entered an order on June 20, 1975, vacating its previous order of April 10, 1975, which had dismissed all prior proceedings without prejudice.

APPENDIX B

AFFIDAVIT OF WILLIAM ALLAIN
(Without Attachments)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3830 (A)

PEGGY J. CONNOR, et al.,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

CLIFF FINCH, et al.,

Defendants.

AFFIDAVIT OF WILLIAM A. ALLAIN

STATE OF MISSISSIPPI, COUNTY OF HINDS

WILLIAM A. ALLAIN, after first being duly sworn, deposes and says as follows:

1. I am Special Counsel for the Defendants and the Special Joint Legislative Committee on Reapportionment in the above-styled and -captioned cause and I have been actively involved in the defense of this cause since its inception. I am further personally familiar with the efforts of the defendants, the Special Joint Legislative Committee

on Reapportionment and the Mississippi Legislature to respond to the Order of the United States District Court inviting the Mississippi Legislature to submit a plan for court adoption, and I am personally familiar with their efforts to fashion and effectuate a statutory reapportionment plan.

2. I have reviewed the files and records maintained by the Special Joint Legislative Committee on Reapportionment together with the calendar of events since the decision of the Supreme Court of the United States in this cause on May 31, 1977, and my review of said files, records and calendar of events reveals that the following events and efforts took place and were made at the time and in the manner indicated.

3. On May 31, 1977, the Supreme Court of the United States reversed the decision of the three-judge District Court implementing a statewide single member district plan for the Mississippi Legislature since the districts fashioned by the Court contained excessively high population deviations in both the House and Senate plans.

4. On July 28, 1977, the Supreme Court of the United States filed its mandate with the Clerk of the United States District Court for the Southern District of Mississippi for further proceedings in conformity with its opinion, and on August 2, 1977, the District Court entered its order requiring the parties and inviting the Mississippi Legislature to file within ninety days a complete plan for the reapportionment of the Mississippi Legislature agreeable to the standards enunciated by the Supreme Court and to the extent possible with the guidelines of the District Court.

5. On Sunday, August 7, 1977, counsel for the defendants met in response to the District Court's order to prepare for the meeting with the respective election committees of the Legislature to be held on the following day.

6. On August 8, 1977, a meeting of the members of the

House Committee on Apportionment and Elections and the Senate Elections Committee on Elections was held in the office of the Attorney General of the State of Mississippi for the purpose of discussing the invitation extended to the Mississippi Legislature by the Court order of August 2, 1977. On this same date certain members of the Legislature and the Mississippi Attorney General and members of his staff met with the Governor and his staff for the same purpose.

7. On August 9, 1977, the Governor issued, by proclamation, his call to the members of the Mississippi Legislature to convene in special session for the purpose of considering the invitation and responding to the Court. A copy of the Proclamation is attached as Appendix 1.

8. During the week of August 8, 1977, counsel for defendants and legislative staff members conferred to prepare a resolution to be submitted to the Legislature to establish a Special Joint Legislative Study Committee on Reapportionment.

9. During this same period of time, the Attorney General and other counsel made contact with various demographic, computer and statistical experts throughout the United States to discuss availability and possible employment for the purpose of formulating reapportionment plans.

10. On August 12, 1977, the Mississippi Legislature convened the First Extraordinary Session of 1977 and adopted S.C.R. 502 which created the Special Joint Legislative Study Committee on Reapportionment (hereinafter referred to as "the Joint Committee"). A copy of the Resolution is attached as Appendix 2.

11. On this same date, the House adopted H.C.R. 1 which requested Congress to extend the deadline for a State to contract with the Bureau of the Census for the taking of a census count by precincts. This resolution was adopted on August 13, 1977, by the Senate.

12. On Saturday, August 13, 1977, the newly created Joint Committee met and organized. The Joint Committee created a subcommittee (hereinafter referred to as "the Subcommittee") for the purpose of interviewing and employing experts to assist in the formulation of reapportionment plans for the Mississippi Legislature. Further, the Legislature enacted H.B. 2 which authorized the Legislature to contract with the Census Bureau for the taking of the 1980 census by block count for the state at large.

13. On August 15, 1977, counsel for the defendants conferred in preparation for a meeting with the Joint Committee to discuss procedures necessary to respond to the Court's invitation.

14. On August 16, 1977, the Joint Committee met and was briefed by counsel for the defendants. The Committee voted to employ special counsel for the Joint Committee to assist the Attorney General and his staff in preparation of a reapportionment plan for Mississippi. A staff director was also employed, and counsel and staff conferred in regard to the employment of certain experts. The Attorney General continued telephone conferences and communications with experts to be interviewed by the subcommittee.

15. On August 17 and 18, 1977, counsel for defendants and the Joint Committee, by telephone conference and communications, made preparation for a meeting of the subcommittee and certain experts in Washington, D.C.

16. On August 19 and Saturday, August 20, 1977, the subcommittee interviewed in Washington, D.C. certain experts in the field of formulating apportionment plans. The chairman of the Joint Committee at that time obtained a copy of census data for Mississippi copied directly from the master tape in the Bureau of the Census.

17. On Sunday, August 21, 1977, counsel for defendants and the Joint Committee conferred with the staff director regarding procedures for gathering statistical data necessary

for the formulation of a reapportionment plan. The staff director met with certain experts retained during the interviews in Washington, D.C.

18. On August 22, 1977, retained counsel for the Joint Committee met with the Mississippi Attorney General in Washington, D.C. The staff director, associate counsel, and the chairman of the Joint Committee met with certain experts to determine the best method for the programming and utilization of the statistical census data.

19. On August 23 and 24, 1977, retained counsel conferred with members of the subcommittee and certain experts in preparation for a meeting and interviews to be held in Chicago, Illinois, on August 25, 1977.

20. On August 25, 1977, retained counsel, the Mississippi Attorney General, members of the subcommittee and staff director met in Chicago, Illinois, and interviewed certain experts in the field of formulating apportionment plans.

21. On August 26, 1977, counsel for defendants and the Joint Committee met with certain individuals to discuss the most advantageous utilization of census data necessary for the development of the plan.

22. On Saturday, August 27 and Sunday, August 28, 1977, counsel for the defendants met and conferred for the purpose of preparing for a meeting with the Joint Committee to be held on September 7, 1977.

23. On September 1-5, 1977, counsel and staff continued to prepare for the September 7, 1977, meeting of the Joint Committee.

24. On September 1, 1977, the Chairman of the Joint Committee met with representatives of the Circuit Clerks' Association to discuss any problems which might occur as a result of the development of a reapportionment plan based upon enumeration districts.

25. On September 6, 1977, counsel for defendants met with the Chairman of the Joint Committee, committee staff and certain members of the Legislature in further preparation for the meeting with the Joint Committee on September 7, 1977.

26. On September 7, 1977, the Joint Committee met with retained counsel and members of the staff of the Attorney General of Mississippi. The committee discussed the formulation of a reapportionment plan and further met with certain officials of the Bureau of the Census, including Mr. Marshall Turner, Chief of the Demographic Division of said bureau.

27. On September 8, 1977, counsel for defendants prepared memorandum on meetings held on September 6 and 7, 1977.

28. On September 12, 1977, counsel for defendants and the Joint Committee conferred with the Chairman of the Joint Committee and staff director in regard to procedures for formulating apportionment plans.

29. On September 13, 1977, retained counsel, the Mississippi Attorney General and the staff director conferred in regard to the formulation of the plans.

30. On September 14, 1977, counsel for defendants and the Joint Committee met with the committee staff regarding the proposed tentative plans and their compliance with the guidelines of the Supreme Court of the United States in the preparation for the hearings to receive comments from legislators to be held on the 27th and 28th of September, 1977.

31. On September 20, 1977, counsel conferred with the Chairman of the Joint Committee and its staff director in regard to the completed drafts of the proposed tentative reapportionment plans.

32. On September 21, 1977, a meeting was held with

the Joint Committee, certain legislators and the Attorney General of Mississippi in preparation for the legislators' hearings on September 27 and 28, 1977.

33. On September 22, 1977, a meeting of the Joint Committee was held for the purpose of reviewing the proposed tentative plans.

34. On September 23, 1977, a conference was held by counsel for defendants and the Joint Committee to discuss various legal ramifications relative to the reapportionment plans and legal research of the Mississippi constitutional and statutory provisions in regard thereto.

35. On September 26, 1977, counsel for defendants and the Joint Committee conferred with experts and staff director in regard to the reapportionment plans as they relate to the legislators' hearings to be conducted on September 27 and 28, 1977.

36. On September 27 and 28, 1977, the Joint Committee conducted hearings to secure comments of legislators on the proposed tentative plans.

37. On September 29, 1977, counsel for defendants and the Joint Committee conferred in regard to the comments received from legislators at the hearings conducted on September 27 and 28, 1977.

38. On September 30, 1977, counsel for the defendants and the Joint Committee conferred with Gerald Jones, attorney for the United States Justice Department, in regard to the tentative reapportionment plans.

39. On October 3 and 4, 1977, counsel for the defendants and the Joint Committee conferred with the staff in preparation for a meeting of the Joint Committee to be held on October 5, 1977.

40. On October 5, 1977, the Joint Committee met with counsel and staff and discussed the tentative plans and the input received during the hearings for the legislators.

41. During the week of October 3, 1977, notices of the public meetings to be held October 11 and 12, 1977, were sent to major newspapers throughout the state, and to assure their publication they were published as paid legal notices. In conjunction with such notices, copies of the proposed reapportionment plans were sent to the circuit clerk of each county and made available to the citizens thereof for their inspection. The notices requested the public to review the plans and present any testimony they desired to the Joint Committee. A sample copy of a public notice is attached as Appendix 3. Additionally, a news release was sent to radio and television stations and other local newspapers throughout the State, with a request that it be broadcast and published as a public service announcement. A sample copy of a news release is attached as Appendix 4. Special effort was made to generate as much publicity as possible in black communities by having the notice and release published and broadcast by newspapers and radio and television stations covering black communities.

42. On October 6-10, 1977, counsel for the defendants and the Joint Committee conferred with the staff in preparation for the public hearings to be conducted on October 11 and 12.

43. On October 11 and 12, 1977, the Joint Committee met and conducted public hearings to receive comments from the general public in regard to the tentative reapportionment plan.

44. On October 13, 1977, counsel for the defendants and the Joint Committee conferred with the Governor and his staff relating to the call of the Second Extraordinary Session 1977 to consider a reapportionment plan for Mississippi.

45. On October 14, 1977, the Joint Committee met and voted to recommend that the Legislature create a

reapportionment commission for the formulation of future reapportionment plans for the State. Further, counsel for the defendants and the Joint Committee met with Gerald Jones and certain members of his staff in regard to the tentative reapportionment plans.

46. On October 15 and 16 (Saturday and Sunday) and 17, 1977, counsel for defendants and the Joint Committee and staff prepared for public hearings to be conducted on October 18, 1977. Public notices and news releases as described above were again circulated.

47. On October 18, 1977, the Joint Committee conducted public hearings and the Legislature convened for the Second Extraordinary Session 1977 for the purpose of considering a reapportionment plan for Mississippi.

48. On October 19-21, counsel for the defendants and the Joint Committee met with the Senate and House election committees and members of both houses, and explained the reapportionment plans for the Senate and House.

49. On October 21, 1977, the House adopted H.C.R. 3 which extended the existence of the Joint Committee.

50. On Saturday, October 22, 1977, counsel for defendants and the Joint Committee conferred with Gerald Jones in Washington, D.C. in regard to the reapportionment plans.

51. On Sunday, October 23, 1977, counsel for the defendants and the Joint Committee conferred with the Chairman of the Joint Committee and its director and certain experts in preparation for continued meetings with the Legislature in regard to the reapportionment plans.

52. On October 24, 1977, counsel for defendants and the Joint Committee met with the election committees of the Legislature and conferred with certain members of both houses in regard to the formulation of a final reapportionment plan.

53. During the week of October 24-28, 1977, S.C.R. 503 and H.C.R. 4 were reported and adopted by both houses of the Mississippi Legislature. S.C.R. 503 and H.C.R. 4 are concurrent resolutions embodying a reapportionment plan for the Mississippi Legislature based upon census enumeration districts. Further, during that same week the Legislatutre reported and/or adopted several other important pieces of legislation concerning reapportionment, i.e., legislation extending the existence of the Joint Committee (H.C.R. 3), and legislation establishing a commission to reapportion the Legislature after 1980 (H.B. 3).

54. On November 1, 1977, the Joint Committee staff began gathering data for and commenced analyses of plans filed by plaintiffs and the Department of Justice.

55. On November 2, 1977, counsel for the defendants and the Joint Committee began their study of plaintiffs' and the Department of Justice's plans.

56. On November 3 and 4, 1977, counsel conferred with Mr. Marshal Turner, Chief of the Demographic Division of the Bureau of the Census, regarding availability of enumeration district splits to insure the accuracy and possiblity of using precincts instead of enumeration districts. On November 4, 1977, counsel conferred with the Chairman of the Joint Committee regarding plans for reapportionment and court proceedings.

57. On Saturday, November 5, 1977, counsel reviewed reapportionment plans and conferred with Mr. Del Dunn, a member of the Joint Committee staff, regarding the impact issue and conferred with the staff director regarding maps of the plans of the plaintiffs and the Department of Justice.

58. On Sunday, November 6, 1977, associate counsel met with Professor Richard Morrill in Seattle, Washington, to further analyze the plans of the plaintiffs and the Department of Justice.

59. On November 7, 1977, analyzation of the plans of the plaintiffs and the Department of Justice by counsel and Professor Morrill continued.

60. On November 8, 1977, counsel continued analysis of plaintiffs' plans and conferred with experts and associate counsel in preparation for the meeting with experts in Atlanta, Georgia, to be held on November 11, 1977, and in preparation for the meeting of the Joint Committee to be held November 16, 1977.

61. During the second and third weeks of November, counsel conferred daily with the committee staff, experts and members of the Legislature and the Joint Committee in preparation of the evidentiary hearing in the United States District Court for the Southern District of Mississippi, to commence on November 21, 1977. These conferences were held in Atlanta Georgia; Seattle, Washington; Jackson, Mississippi; and Washington, D.C.

62. On November 21 and 22, 1977, the evidentiary hearing was conducted on the reapportionment plans.

63. On November 23, 24 and 25, 1977, counsel conferred with experts in regard to the District Court's indication of its preference for a reapportionment plan constructed on precinct lines as opposed to a plan based on census enumeration districts.

64. During the week of November 28, 1977, counsel met with the Joint Committee, committee staff and individual members of the Legislature and commenced work on the formulation of a precinct-based reapportionment plan by moving the enumeration district lines to the nearest precinct lines and obtaining census splits from the Bureau of the Census.

65. On December 1, 1977, the Mississippi Legislature reconvened the recessed Second Extraordinary Session. On that date the House reported H. B. 6, directing the county

registrars to make administrative transfers of voters rather than a reregistration thereof.

66. On December 2, 1977, H. B. 3 was adopted by the House.

67. During the week of December 5, 1977, the Legislature met and the respective election committees met and reported S.B. 2003 and H.B. 9, both bills being adopted during that same week. These bills embody the statutory plans based on enumeration districts for the Senate and the House. Further, S.C.R. 507 was reported and adopted by the Legislature during that same week which directs the Secretary of State to submit to the electorate a constitutional amendment establishing a Reapportionment Commission.

68. On December 12 and 13, 1977, the deposition of the Joint Committee Chairman was taken by the plaintiffs and plaintiff-intervenor as previously authorized by the Court.

69. During the last two weeks of December 1977, the committee staff worked daily on the preparation of a reapportionment plan based on precinct lines to submit to the Court.

70. On January 3, 1978, the Mississippi Legislature convened the 1978 Regular Session.

71. During the first two weeks of January 1978, the depositions of the staff experts were taken in preparation for trial (i.e., Fortenberry, Dunn, Webb, Hofeller and Morrill).

72. During the weeks of the 16th, 23rd and 30th of January 1978, the committee staff worked on formulating the precinct plan to submit to the Court and counsel made preparation for trial which was to commence on February 14, 1978.

73. During the weeks of February 1, 6 and 13, 1978,

the staff worked on and the Legislature reported and adopted S.C.R. 627 and H.C.R.'s 53 and 54. These resolutions embody the basic precinct plans tendered the Court during the February 14, 1978 hearing. Numerous meetings of the respective election committees were held throughout this period.

74. On February 14, 1978, the evidentiary hearing was held before the District Court with regard to the reapportionment plans.

75. Between February 14, 1978, and the end of that month, the staff continued to work on and perfect the precinct plan filed with the Court during the February 14, 1978 hearing, working in close conjunction with the Bureau of the Census, which was continuously providing the staff with population figures for the census enumeration district splits.

76. During the period of March 1, 1978, through March 7, 1978, the Joint Committee, staff, the election committees and the Legislature continued perfecting the precinct plan previously filed with the Court at the February 14, 1978 hearing which was reported and adopted as H.C.R. 116 by the Legislature and filed with the Court on March 7, 1978, together with supporting data.

77. Immediately upon filing H.C.R. 116, the Legislature returned to the task of formulating a statutory precinct reapportionment plan for the Mississippi Legislature to be effectuated under Section 5 of the Voting Rights Act of 1965, as amended. This task had been interrupted by the Legislature's desire to formulate a court precinct plan in view of the District Court's announced preference for such a plan.

78. The House election committee reported to the House on March 22, 1978, H.B. 1491 (House statutory precinct plan), and the Senate election committee, on March 24, 1978, reported to the Senate S.B. 3098 (Senate statutory

precinct plan). On March 23, 1978, the House adopted H.B. 1491.

79. On Saturday, March 25, 1978, the Senate passed S.B. 3098.

80. During the week of March 27, 1978, the House adopted S.B. 3098, and the Senate adopted H.B. 1491.

81. On April 7, 1978, the Legislature adjourned sine die.

82. S.B. 3098 and H.B. 1491 were sent to the Governor, after having been enrolled on April 4, 1978, and after considering these bills, the Governor signed them into law on April 21, 1978. Copies of S.B. 3098 and H.B. 1491 are attached as Collective Appendix 5.

83. Immediately thereafter the staff of the office of the Attorney General of Mississippi commenced preparation of the submission of S.B. 3098 and H.B. 1491 to the Attorney General of the United States, pursuant to the direction of the Legislature.

84. On May 3, 1978, the Special Master filed his suggested plan of reapportionment for the State of Mississippi.

85. On May 9, 1978, the Special Master filed suggested alternatives for the Senate.

86. On May 11, 1978, the Special Master filed a submission revising certain House and Senate districts for Warren and Forrest Counties.

87. On May 15, 1978, the District Court entered an order instructing the Special Master to file a final proposal incorporating his plan in final form so as to include the amendments. Said order provided that all parties having objections to the Special Master's plan file such objections within fifteen days after the Special Master filed his final plan and invited the appropriate legislative committee to file objections to same, if any.

88. On May 18, 1978, the Special Master filed with the Court the above-mentioned reapportionment plan.

89. Immediately thereafter, the Joint Committee staff, the office of the Attorney General of Mississippi, and retained counsel for the committee and defendants commenced review and analysis of the plan filed by the Special Master. During this same period of time, the State was continuing to gather supporting data for its Section 5 submission.

90. On June 1, 1978, the State of Mississippi submitted to the Attorney General of the United States S.B. 3098 and H.B. 1491 together with extensive and comprehensive supporting data for Section 5 clearance. A copy of the Submission Statement (without its accompanying appendices) is attached as Appendix 6.

91. On June 2, 1978, the defendants and the Joint Committee filed their objections to the plan previously filed by the Supreme Master.

92. On June 12, 1978, the District Court entered an order requesting the parties to meet in settlement conference within fifteen days of the entry of said order in which they were requested to explore every reasonable possibility for the entry of a consent decree terminating this litigation.

93. The Joint Committee and defendants continued to review the Special Master's plan and the plans submitted by the plaintiffs and the Justice Department in preparation for the meeting with plaintiffs and the Justice Department.

94. On June 22, 1978, attorneys for the plaintiffs, Justice Department, and the State met pursuant to the above-mentioned order of the District Court.

95. On June 23, 1978, the Joint Committee met to consider the initial proposals presented by plaintiffs and the Justice Department during the negotiation session held on June 22, 1978. Further, in the afternoon of the 23rd another

meeting was held with attorneys for the Joint Committee, the defendants, the Justice Department, and the plaintiffs.

96. During the first full week of July, counsel for the defendants and the Joint Committee continued to negotiate with counsel for the plaintiffs and the Justice Department. It was necessary during this period of time to recall the Joint Committee experts in order to analyze the proposals presented and to rearrange certain districts in order to accommodate such proposals.

97. On July 12, 1978, counsel for all parties and for the Joint Committee again had a formal conference for the purpose of attempting to finalize a compromise as to the reapportionment plans.

98. After the above-referred to meeting, counsel for the parties and Joint Committee continued to negotiate and the experts continued to redraw certain districts. On July 25, 1978, counsel for all parties and the Joint Committee again met for formal negotiations.

99. On July 26, 1978, counsel for the defendants, the Joint Committee and plaintiffs had an informal meeting for the purpose of furthering the above-referred to negotiations.

100. On July 27, 1978, counsel for the defendants and the Joint Committee met informally with counsel for the plaintiffs in furtherance of the negotiations. Further, notice was mailed to all members of the Joint Committee that a committee meeting would be held on August 2, 1978, at which time the proposals of the plaintiffs and the Justice Department would be submitted to the committee for final action. Also the Mississippi Attorney General sent a letter to the Attorney General of the United States requesting a personal conference to discuss the Section 5 submission. A copy of the letter (dated July 26, 1978) from Attorney General A. F. Summer to Attorney General Griffin Bell is attached as Appendix 7.

101. By letter of July 28, 1978, Gerald Jones, Chief of the Voting Section, Civil Rights Division, Department of Justice, responded to Attorney General A. F. Summer's request made to the United States Attorney General Griffin B. Bell to meet with him personally. Gerald Jones advised that a meeting could be arranged with an appropriate representative of the Attorney General to discuss S.B. 3098 and H.B. 1491. A copy of this letter is attached as Appendix 8.

102. On July 31, 1978, Attorney General A. F. Summer, by letter of that date, advised Gerald Jones that his response would not provide the forum requested. A copy of this letter is attached as Appendix 9.

103. On August 1, 1978, Attorney General A. F. Summer was telephonically advised by Gerald Jones that a letter from Assistant Attorney General Drew Days, III, had been mailed wherein an objection had been interposed to S.B. 3098 and H.B. 1491.

104. Immediately upon the conclusion of the telephone conversation referred to in Paragraph 103 above, Attorney General A. F. Summer directed his Special Counsel in Washington, D.C. to file in the District Court of Washington, D.C. a complaint for Section 5 declaratory relief. A copy of this complaint is attached as Appendix 10. An amended complaint correcting typographical errors is to be filed on August 3, 1978.

105. While I cited above only the key events and efforts which occurred and were carried out on specific dates, I am further aware that throughout the entire period of time since the Supreme Court's decision of May 31, 1977, that the staff of the Joint Committee, the attorneys for the defendants and the Joint Committee and members of the Mississippi Legislature have worked continuously in a diligent, expeditious and competent manner in responding to the Orders of the United States District Court for the

Southern District of Mississippi by preparing plans, reviewing plans of plaintiffs and the Special Master, participating in good faith in Court-directed settlement negotiations, and concurrently drafting, enacting and pursuing under Section 5 the Legislature's statutory reapportionment plan which I believe to be best for the people of the State of Mississippi. Further, affiant saith not.

/s/ William A. Allain
William A. Allain

Sworn to and subscribed before me, this 2 day of August, 1978.

/s/ Heber Ladner
Secretary of State of Mississippi and
Ex Officio Notary Public

My Commission expires January 1980.

APPENDIX C

AFFIDAVIT OF JERRIS LEONARD

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3830 (A)

PEGGY J. CONNOR, et al.,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

CLIFF FINCH, et al.,

Defendants.

AFFIDAVIT OF JERRIS LEONARD, ESQUIRE

STATE OF MISSISSIPPI, COUNTY OF HINDS

JERRIS LEONARD, Esquire, 1700 Pennsylvania Avenue, Washington, D.C., having been duly sworn, deposes and says as follows:

1. I am Special Counsel to the Legislature of Mississippi. One of my responsibilities in that role was to assist in the formulation of an application to the Attorney General of the United States under Section 5 of the Voting Rights Act of 1965 (hereinafter "Section 5") seeking approval to implement S.B. 3098 and H.B. 1491, statutory reappor-

tionment plan for the Senate and House of the Mississippi Legislature.

2. On March 29, 1978, to support Mississippi's application to the Department of Justice under Section 5, I advised Fred McGrath, trial attorney in the Civil Rights Division of the Department of Justice that I desired to examine all "Federal Observer Reports" (hereinafter "Observer Reports"). In my view, based on my past experience as Assistant Attorney General for the Civil Rights Division of the Department of Justice, review of these documents would produce information relevant to Mississippi's Section 5 submission. We wanted to demonstrate, among other things, that the number of complaints and incidents reported in connection with the electoral process in Mississippi had diminished over past years.

3. I did not view my request at the time it was made as unusual, burdensome or oppressive. Indeed, only a few weeks earlier, on February 14, 1978, I understood Mr. McGrath of Justice to have had such documents in his possession in Jackson, Mississippi, and, in open court, to have offered to allow me to inspect them. (See February 14, 1978, transcript in *Connor v. Finch*, C/A #3930(A) (S.D. Miss.), page 89, lines 17-20). In my view, my March 29 request was only an attempt by me to accept an offer McGrath had previously made.

4. McGrath, during my March 29, 1978, phone conversation with him, indicated, to my surprise, that he was unwilling to authorize disclosure of the Observer Reports on his own authority to me or members of my staff. Even after assuring McGrath that he could block out the names of any persons mentioned in the reports, he still would not commit himself to permit inspection of the documents. He said he would have to check and call me back and let me know.

5. On April 3, 1978, McGrath responded that he could

not reply to my oral request and stated that a written request indicating why we desired the Observer Reports was needed.

6. Somewhat perplexed, on April 4, I reduced my prior oral request to writing. I emphasized the urgency of the request, *i.e.*, my view that the information was necessary for preparation of Mississippi's Section 5 submission. I requested two categories of information. The first was complaints filed with the Department of Justice Civil Rights Division emanating from Mississippi commencing with the 1967 elections. The second was the Observer Reports referred to above.

7. Nine days later, on April 13, 1978, not having received an oral or written response to my April 4 letter, I directed a telegram to the Attorney General of the United States stating that the April 4 letter had not been responded to and that the information requested was urgently needed.

8. During the next six days, April 14, 1978, through April 19, 1978, phone conversations between myself and persons on my staff with Gerald Jones, Chief of the Voting Rights Section in the Department of Justice Civil Rights Division, led to the conclusion that, in order to obtain the Observer Reports, we would have to file a formal written request pursuant to the Freedom of Information Act. It appeared, however, that the other category of information requested (the complaints) in my April 4 letter would be forthcoming. Jones promised a sample of this material for my review to be sure that information of that type was needed before it was retrieved from the files.

9. On April 25, 1978, I filed a Freedom of Information Act request for all of the Federal Observer Reports.

10. On April 26, 1978, I called Gerald Jones and advised him that the sample docket sheets he had provided on complaints to the Civil Rights Division indicated to me a need to see the entire file on each complaint. Jones said he would get back to me.

11. On April 28, 1978, Jones advised it would be May 10 before we could examine the requested complaint files. The time lag was attributed by Jones to forecasts of delay in pulling the files.

12. On May 16, 1978, I wrote a letter to Jones addressing the need to obtain information on the disposition of the complaints. At this time, we had not had an opportunity to review any materials from the complaint files.

13. I next received a letter dated May 17, 1978, stating a need by the Department of Justice to have further time to study the materials sought (Observer Reports) by our Freedom of Information Act request and extending the deadline for a response to that request to May 22, 1978.

14. On May 20, 1978, Justice denied our Freedom of Information Act request for the Federal Observer Reports.

15. On Monday, May 22, 1978, having received nothing in response to our request to review the complaint files and having been denied the Federal Observer Reports, I concluded that the State of Mississippi would have to commence its Section 5 suit without these meaningful materials. I so advised the Attorney General of the United States by letter, a copy of which is attached hereto. During all communication with Justice, written and oral, it was clear that we did not desire the names of complainants nor would we divulge them if we were permitted access to unexpurgated files containing such names.

16. On June 1, 1978, ten days after advising the Attorney General that Mississippi would proceed without the requested materials, H.B. 1491 and S.B. 3098, with appropriate supporting materials available, which did not include information we had hoped to obtain from the Department of Justice, were filed with the Attorney General of the United States.

17. Since the filing of our Section 5 application, we have

received none of the requested information from the Department of Justice. Thus, in the nearly four months between the initial request for information related above and July 29, 1978, we have received no data or information from the Department of Justice for use in connection with our Section 5 application. Further, I have become more convinced than ever of the relevance of this data to Mississippi's position. Press reports indicate that Justice did not bother to send Federal Election Observers to Mississippi for federal primary elections for seats in the United States House and Senate in 1978.

Further, affiant saith not.

/s/ Jerris Leonard
JERRIS LEONARD

SWORN TO AND SUBSCRIBED before me, this the 21 day of August, 1978.

/s/ Heber Ladner
NOTARY PUBLIC

My Commission Expires January 1980.

[Attachment to Affidavit of Jerris Leonard]

May 22, 1978

Honorable Griffin Bell
Attorney General of the
United States
Department of Justice
Washington, D.C.

Dear Mr. Attorney General:

Commencing on March 29, 1978, one month and 25 days ago, we made, on behalf of the State of Mississippi, a request to allow attorneys for the State to review those files in the Voting Rights Section of the Civil Rights Division as follows:

1. "Federal Observer Reports" commencing with the elections of 1967 through the most recent elections, and

2. the disposition of complaints filed against election officials in the State of Mississippi for all elections beginning in 1967 through the elections of this year.

We indicated at that time and have continued to indicate that we have no desire of knowing the names of the complainants or the names of any individuals involved in either of these two series of documents.

I gave attorneys in the Civil Rights Division my personal commitment that no names would be copied from the reports nor did we want actual copies of any of the above documents.

The purpose of this request was to allow the State of Mississippi to prepare a meaningful submission to you pursuant to Section 5 of the Voting Rights Act.

Continuously throughout the exchange of telephone calls and correspondence we have been viewed with suspicion by your subordinates in the Civil Rights Division in spite of the fact of our continuing assurances that the reason we

desire the information is to make a meaningful preparation for the Section 5 submission or in the alternative a Section 5 suit in the Federal District Court for the District of Columbia and our further assurances that we had no interest in the names of any specific individuals.

These assurances have been stated time and time again, but apparently assurances by counsel on behalf of a sovereign State carry little weight with your subordinates.

The information we seek is clearly available to us upon commencement of a lawsuit as mentioned above.

It must be obvious to any neutral observer that these actions by the Civil Rights Division are foreclosing a meaningful Section 5 submission to you thus requiring the State to commence the Section 5 suit, a truly unfortunate result.

Be advised that on behalf of the State of Mississippi, I withdraw our requests for the information set out above.

Very truly yours,

LEONARD, COHEN AND GETTINGS

/s/ Jerris Leonard
Jerris Leonard

JL:kw

APPENDIX D

TRIAL TESTIMONY TRANSCRIPT IN THE SECTION 5 CASE

TESTIMONY OF THOMAS CAMPBELL

Q. Now, Mr. Campbell, let's begin with July of 1977, last year. Would you tell the Court, and please be brief, what you and the legislative leadership did after the mandate came down from the Supreme Court in July in Connor v. Finch?

A. We received an invitation from the District Court for the Legislature to submit a plan.

Briefly, the Governor called some legislative leaders together, including myself. We discussed the nature of that invitation, of what we would be required to do. I think in — it was early suggested in those meetings that we not only respond to the Court's invitation for a court-type plan, but that we might consider construction of a statutory plan of our own.

We finally — finally, decision was made that a special session would be necessary. The Governor called it in early August. That was a very brief special session at which time the legislation authorizing the Joint Committee for Reapportionment was passed. And the Legislature adjourned and immediately after that, the Joint Committee, which was composed of the Elections Committee of the Senate and Apportionment and Elections Committee of the House, the two standing regular committees were the membership of the Joint Committee by the terms of that legislation.

Q. Now, before you get into that, let me just back up one moment.

Who were the legislative leaders who were called to the meetings with the Governor?

A. Well —

Q. I don't mean to name them all, but give us an idea what the positions were that they held.

A. Oh, the Chairmen of the Appropriations Committees for both House and Senate.

The Chairmen of the Judiciary Committees, which there are two, in both House and Senate.

The Chairman of the Elections Committee of the Senate — Chairman, Apportionment/Elections Committee of the House.

Q. Were the officers of the two houses at the meeting?

A. Oh, yes, the Speaker of the House, Lt. Governor, President Pro Tem of the Senate. This is the type of people that were called by the Governor to meet.

Q. Incidentally, in your legislative session, did you appropriate any funds — that is, the legislative session of August '77, did you appropriate any funds for the Joint Committee to use and to carry out its obligations?

A. A half million dollars appropriated to contingency funds of the House and Senate to be available for use by the committee, but it was not a directed appropriation to the Joint Committee, but in contingent funds for operation of the committee.

Q. Now, subsequent to the extraordinary session of the Legislature in August of '77, what did you then do? What did the Legislature do?

A. Well, first, the Joint Committee met and organized itself. I was elected the chairman of the committee. I was the chairman of the House committee. The chairman of the Senate committee was elected vice chairman.

We organized and employed counsel at the suggestion of the Attorney General, Mr. Summer, and his firm was

employed and began to make steps at that time to employ the experts, the specialists that would form up the working staff of the committee.

So we had meetings in Washington and Chicago to meet with people who had been suggested by the Attorney General and counsel, and by Mr. Marshal Turner from the Bureau of the Census.

Q. So you went to the Bureau of the Census, to Mr. Turner, Marshal Turner for suggestions as to the employment, or for names of people who might be experts in this area?

A. That is correct.

Q. And you indicated that you had meetings in Washington and Chicago. Was that with counsel and with the experts?

A. Yes, that was with the people that had been suggested by Mr. Turner and by counsel. We met with counsel and a Subcommittee of the Joint Committee actually did the work of interviewing these experts and potential employees of the committee, to form a 4-man subcommittee of which I was a member.

THE COURT: Screening committee?

THE WITNESS: Screening, yes, sir.

BY MR. LEONARD:

Q. During the course of those sessions, in addition to interviewing and getting to meet potential consultants and experts for the committee, what else did you do with respect to the question of reapportionment itself?

A. Well, at that time we were faced with a data problem. That was the problem — main problem that we were concerned with then. The Legislature had wished to construct their plans out of precincts which were the voting building

blocks of the state and had expressed a very strong interest in doing that.

We were advised by the experts that we discussed this with that there was no standardized statistically really reliable way of converting all of the census information over to our precincts. The two didn't coincide.

That was what was really concerning us most at this particular time we were forming up the staff.

Q. Did you from those interviews and meetings retain outside consultants?

A. Yes, we did. We hired experts and then we got some local staff people to round out the committee to assist those experts and begin to work on our problem.

Q. Now, let's just stick to the outside experts for a moment. Tell the Court who those were.

A. Tom Hofeller of California, Carl Webb of New York; we had Dr. Dale [sic] Dunn of Georgia, and Dr. Richard Morrel [sic] of the State of Washington.

They were able to give us varying amounts of their time. This was at the outset; was a hurry-up crash program, and we had to take what amount of working time they could afford to give us. So we had really some variations in the amount of assistance they were able to give us because of that.

Q. Mr. Campbell, during the period of August '77 through the end of the legislative session in April of 1978, did your committee have various hearings?

A. Yes, we did. We had legislative hearings and we had public hearings at each stage. We had legislative hearings for both the court-type plan and the statutory plan that we —

THE COURT: By legislative hearings, Mr. Campbell, do you mean hearings before the Joint Committee?

THE WITNESS: Yes, Your Honor. The Joint Committee sat to hear from legislators who were not members of the committee. That's the legislative hearing that I refer to.

THE COURT: What about people that were not members of the Legislature? Did you have hearings for them?

THE WITNESS: Yes, sir, we did. The Joint Committee again, sat as the full committee to hear members of the public generally.

Here is the way we constructed it. We would have — we decided to have first of all input from the legislators on what modifications we made to the plan or what final plans we achieved by that, those series of hearings, we would then expose to the public by sending out the plans, maps, documentary material, statistical data behind it, to every one of the counties in the state.

We sent that material to the circuit clerk and then we would expose those plans to public notice by giving notice in the papers, in the radio and, of course, we got a great deal of media coverage during that period of time without having to pay for it, a lot of it was covered anyhow.

But we did have the two types of hearings. We had the legislative hearing first and got that kind of input, made modifications to the plans, readvertised the modified plans and had public hearings later.

THE COURT: I take it what happened, your experts drafted a plan and on the basis of that plan, you had a hearing for the legislators.

They came in and made their respective comments that presumably led to some changes in the plan, and the revised plan, as I understand it, was then sent to the various counties through their circuit clerks. They probably posted it on the bulletin board, whatever they did, in various of the media and throughout the counties publicized the plan.

First of all, with respect to the hearings for the legislators, how long did that take and over what period of time?

THE WITNESS: We scheduled it for two days. We stayed in session until we heard everyone who wanted to —

THE COURT: How many appeared? You probably had quite a few, didn't you?

THE WITNESS: We didn't have a great number. We would have delegations that would come from a particular county.

THE COURT: I see, and the legislator, I suppose, was — brought his delegation with him.

THE WITNESS: Many cases that happened. We would try to let all speak, but asked them if they would, to please designate a spokesman to give their points of view, so we trimmed it down in that fashion.

THE COURT: If you can recall, how many counties were represented in that operation?

THE WITNESS: The public hearing?

THE COURT: Yes, that is for a legislator with or without his delegation?

THE WITNESS: I really can't recall. It covered, like I said, two days, and we had a number of people to appear. I don't know how to cut it down to just counties.

THE COURT: You were sitting all day long for two days?

THE WITNESS: As I recall, probably cut it off a little on the second day.

THE COURT: Now, when you had hearings for the general public, how long —

THE WITNESS: Again, scheduled them two days.

THE COURT: What kind of response did you get for those hearings?

THE WITNESS: We had less response. We did have some people appear though and made some criticisms and suggestions that we did take into consideration.

THE COURT: Mr. Parker's group appeared as part of the general public, is that correct?

THE WITNESS: Well, we deem that they appeared. Mr. Rims Barber provided some information to Horace Buckley, a member of the Joint Committee, and he made a speech to the Joint Committee relating observations, and objections to a number of things across the state, not confined to his own district.

MR. PARKER: Your Honor, excuse me. We object to that assumption on the part of the witness. We did not authorize Mr. Barber to appear on our behalf.

THE COURT: Well, okay.

MR. PARKER: We did not discuss his testimony.

THE COURT: When you question Mr. Campbell you can bring it out. He didn't have your power of attorney.

MR. PARKER: What's that?

THE COURT: He didn't have your power of attorney.

MR. PARKER: That's correct. Nor was he an authorized agent.

THE COURT: All right. Now, this was sometime in —

MR. LEONARD: October.

(Discussion off the record.)

THE COURT: You may proceed, Mr. Leonard.

BY MR. LEONARD:

Q. That hearing which I think the Court was inquiring

about, that was in October, is that correct, the first hearing for the legislators?

A. When Mr. Buckley spoke? Is that what counsel is asking me?

Q. Yes.

A. My recollection was that Mr. Buckley spoke at the public hearings which followed that. These hearings were about two weeks apart, as I recall.

Q. And then did you subsequently have additional public hearings after the October hearings?

A. Yes, we did. We had some public hearings in November, when we were constructing the statutory version of the plans.

Q. Let me show you what has been marked Plaintiff's Exhibit 33, first of all, and ask you if you can identify that exhibit?

A. Yes, I can.

Q. What is it?

A. That the notice that was run in the newspapers to give notice of our hearings.

Q. Well, that's a copy of a notice that was run in one of the newspapers; is that correct?

A. Yes, sir.

Q. What's the date on that notice? That is the date that it ran in the paper.

A. It ran in the paper on October the 9th, and it gave notice of a hearing on October 11th.

MR. LEONARD: If the Court please, I move Exhibit 33 into evidence.

THE COURT: Exhibit 33, without objection, will be received.

(Whereupon, Plaintiff's Exhibit No. 33 was received into evidence.)

BY MR. LEONARD:

Q. I show you, Mr. Campbell, Plaintiff's Exhibit 34, and ask you if you can identify that?

A. Yes, I can.

Q. And what is that?

A. That is the public notice that was run to give notice of the hearing on November the 28th, and it ran on November the 25th.

Q. And do those notices advise the public that copies of the plans of apportionment and information about them are available in the Office of the Circuit Clerk?

A. Each of the notices do so advise.

THE COURT: Where were these notices placed, Mr. Campbell?

THE WITNESS: We placed them in about 16 newspapers across the state. We gave it pretty wide, or tried to give it widespread area coverage, in local newspapers that more or less cover the entire state. And of course we ran them in the major newspapers that are published in Jackson.

We also had a number of radio spots that we ran. MRN News is a news network that's utilized by many of the radio stations around the state, and we contracted with them, and of course since it appeared on their programs it would go through all of the broadcasting stations that utilized their services.

THE COURT: In other words, this not only went to some 16 newspapers over the state, plus papers in Jackson, the capital, but I suppose to the radio and T.V. media.

THE WITNESS: Yes, sir. T.V. gave us very good coverage during this period. We did not take any television advertisements, but the television cameras were trained almost on our meetings, and they would have interviews with myself and other members of the legislature about what we were doing at the time. It was quite a bit of publicity in the news that we were having public hearings and trying to fashion a plan.

MR. LEONARD: If the Court please, I have another exhibit.

THE COURT: All right.

MR. LEONARD: Unfortunately we did not make copies, but counsel will stipulate to it, and I think it may enlighten the Court.

THE COURT: All right.

BY MR. LEONARD:

Q. Mr. Campbell, I show you what has been marked Plaintiff Exhibit 44, and ask you if you can identify that exhibit?

A. Yes, sir, I can.

Q. What is it?

A. This is the certificate prepared by the Auditor's Office, and it's a listing of the newspapers in which we ran the public notices. This list was prepared at the request of the committee, by the Auditor's Office, and was received by us earlier this year.

MR. LEONARD: If the Court please, I move that into evidence.

THE COURT: Without objection Plaintiff's Exhibit 44 will be received.

(Whereupon, Plaintiff's Exhibit No. 44 was received into evidence.)

BY MR. LEONARD:

Q. Might I ask the Court if the Court would like to look at that for just a moment? It's the only one we have. We'll get some copies made.

THE COURT: All right.

THE COURT: In addition to listing the newspapers, it also gives the costs.

THE WITNESS: Yes, sir.

THE COURT: The biggest item being $600 to the Mississippi radio news network.

THE WITNESS: Yes, sir.

BY MR. LEONARD:

Q. Mr. Campbell, did you take any special care to determine, or to see to it that those notices were run in papers where there were heavy concentrations of black people in the State?

A. Yes, sir, we did. We selected those newspapers that we knew would give coverage to that type of population.

[Transcript pp. 620 (L. 7) — 633 (L. 7)]

Q. Let's get right to the relationship between the E.D. plan and the precinct plan that's here before the Court today.

A. Well, the E.D. plan, the statutory E.D. plan was designed in November, and adopted by the House and Senate at that portion of the special session we had in December,

and then as the legislature went into the regular session our work concentrated on converting that plan from an enumeration district plan to a precinct-based plan. And we managed to do that by the end of the regular session.

[Transcript p. 638 (LL. 11-20)]

Q. Now, the hearings that you have testified to, which were held on October 11th and November 28th, were they with respect to the plans, or the plan that is before the Court in this proceeding?

A. Well, I contend that they are, because I can't divorce the construction of the plan for submission to the Court from the ultimate statutory plan that we adopted.

The information that we received, and the solutions that we came up with at each various stage, all flowed together to form a broad current that carries on down to the statutory plan that's before this Court here. This is the ultimate design. This is the preferred design that the legislature had. And I think that the information that we received at the public hearing stages for the Court plan could certainly be said to have had impact and input into the statutory plan, because it was all of one effort that ran from August through the regular session of 1978.

It is impossible to divorce the information and attitudes you receive in consideration of a Court plan, from those that you receive in considering your statutory plan.

Q. Did the general public have any notice of the fact that these hearings, or did the general public have any notice of the fact that there would be a statutory reapportionment plan considered by the legislature?

A. Well, yes. That's what the November 28th hearings were for. They were to notify the public of the statutory

plan we had on consideration at that time. And that plan was to be taken up in the special session in December.

[Transcript pp. 663 (L. 21) — 664 (L. 25)]

Q. Were all of these hearings held at the State Capital [sic]?

A. Yes, they were.

Q. Was any thought given to holding hearings in county courthouses around the state, to give the public at large a better opportunity to express their feelings about the statutory plans that were being considered?

A. Yes, sir. I know that it was considered because I had considered it myself. But we were under very tight time schedules to respond to the Court's invitation within 90 days, and the luxury of having hearings scattered about the state was just more than we could afford in measure of time.

It would have been very nice to have been able to do that, but we just did not have the time to do it.

Q. Let me hand you Plaintiff's Exhibit 44. And my question to you is, sir, does Plaintiff's Exhibit 44 indicate that the first public notice for the October 11th hearing was given on October 9th?

MR. LEONARD: Excuse me. If the Court please, did counsel say the first paid notice or the first public notice?

MR. PARKER: According to that exhibit —

THE COURT: The exhibit, as I recall it, lists various news media, including a radio station to which they paid certain sums of money.

MR. PARKER: I'm asking about the date of the first public notice given of this hearing.

THE WITNESS: Well, the first one shown on this exhibit is October the 8th.

BY MR. PARKER:

Q. Okay. So at most, members of the public would have had three days' notice of this public hearing to, number one, study the proposed statutory legislative reapportionment plan, and prepare comments on that plan, is that correct, according to the public notices that were published in the newspapers?

A. Well, according to the paid public notices that would be true, but as I have explained to the Court before, we had the same type notices — well, we had the same type of hearings before the legislators, and a great deal of news coverage was given by the press and television, radio all the other media. So overall I did not glean that this was too short a period of time to adequately give notice of what we were doing.

Q. Did people have to call in if they wanted to appear and have their name put on a list?

A. We had asked that they do so, but they were not required to. We tried to keep control of our time period by finding out who would want to appear, and I think we did require, or request, not require, that they let us know if they did wish to appear. Just a matter of control.

Q. Your next public hearing was held on Monday, November 20th, 1977. When was the first publication of that public notice?

A. The earliest appears to be November 22nd.

[Transcript 696 (L. 6) — 698 (L. 10)]

THE COURT: I've got another question; maybe this is obvious to everybody but me. But why in preparing statutory plans did you go from the system of enumeration districts to precincts?

THE WITNESS: Well, for two reasons. Precincts are the voting building block and it is considered that if you

build in problems about conducting legislative elections you also build in voter confusion and it will work to the detriment of black participation in that.

The more confusion and more changes you make, the more you will have a falling off of participation in that process. And the fact that there was but one election to be conducted under this apportionment before there would be the new census in 1980, in which you would have probably have to construct new precincts anyhow and start the process all over again.

So in order to facilitate conducting the elections and not also running into that problem of trying to re-register voters or put them in new districts, tell them that they have to go vote in legislative district at a new place or something of that nature, the decision was made to keep the same precinct framework we've always had as the basic building block, even though it did require some falling away of accuracy of the 1970 figures, because you did have to make some — to convert to precincts, you had to make some conversions and some estimates to do that and you didn't have as detailed racial information about it.

But those are the considerations that we had in trying to hold that precinct pattern in there.

BY MR. LEONARD:

Q. Did both of the Department of Justice and the plaintiffs in the Connor case oppose the legislature's use of enumeration district plans?

A. Yes, sir, they did.

[Transcript pp. 735 (L. 5) — 736 (L. 13)]

TESTIMONY OF THOMAS HOFELLER

DIRECT EXAMINATION

BY MR. LEONARD:

Q. Good morning, Mr. Hofeller. Would you state your name and home address, please?

A. My name is Thomas Brooks Hofeller. I live at 1727 Drue Place, Claremont, California.

Q. And what is your current occupation?

A. I'm the Assistant Director of the Rose Institutes of State and Local Government at Claremont Men's College, in Claremont, California.

Q. And would you tell the Court what your educational background is?

A. I have a Bachelor's degree from Claremont Men's College, a Master's degree in Government from Claremont Graduate School, and I have completed my course work on a Ph.D. from Claremont Graduate School in Government.

Q. How long have you held the position you now hold at Claremont?

A. Since 1973.

Q. Mr. Hofeller, would you tell the Court what your background has been in the process of reapportionment, and for whom you have been employed, giving the dates and the times and the activities that you worked on?

A. My first experience in reapportionment was in the 1965 Reapportionment. I did some work for State Senator James Mills, who was in the Democratic Caucus of the California Senate.

JUDGE PRATT: That's the '65 reapportionment of the State of California?

THE WITNESS: Yes, Your Honors.

After my graduation from college in 1970, I was involved in the writing of a proposal to the California State Legislature to develop a reapportionment system for the California State Legislature.

I worked for Computer Applications, Incorporated, which was a nationwide firm. That proposal won a contract for Computer Applications, a company which then proceeded to go bankrupt, not because of that contract, but because of other work.

A new company was formed called Compass Systems, Incorporated, which was a San Diego corporation, which carried on the work which had been started previously. At that time the contract was enlarged to start the creation of the actual data base, and to start the retrieval system and draw the maps that were necessary for the reapportionment.

BY MR. LEONARD:

Q. What period of time was that?

A. The data base building process actually began in the summer of 1970, with the collection of the political data from the lections of 1970, 1968, and 1966, in the State of California. And this contract continued on until just after the general elections of 1972, when the Legislature stopped its reapportionment effort, at least for a time.

Q. And subsequent to 1972, did you continue to work in the area of reapportionment?

A. I did.

Q. Would you tell the Court that experience?

A. After November of 1972, I was employed as a consultant to the Assembly of Minority Caucus in the reapportionment of the State Legislature. I also was employed by the Republican and State Central Committee as a consultant.

This lasted through the period of June of '73, when the

California State Supreme Court had appointed special masters to reapportion the State, and they proceeded to draw plans for the State of California.

Q. Up until that time in 1973, did you actually work on the development of reapportionment plans?

A. I did. I was the chief technician for the Republican Party and for the Minority Caucus in the Legislature in the drawing of congressional plans and assembling plans for that State.

Q. And the Republicans were in the minority in the California Assembly at that time?

A. Yes. They lost the majority in the 1970 elections.

Q. So that your work in both of those areas, both for the State Central Committee and the Caucus, was on behalf of Republican candidates, I take it?

A. No. Actually, the plans that were drawn were not on behalf of Republican candidates exclusively. There was a lot of work that was done both for the minority members, but also for members of the majority party.

Plans were presented in their entirety, not just the districts that the Republicans were interested in.

Q. So, during that period, you worked actively with representatives of the Democratic Party and its Caucus on the development of these plans; is that correct?

A. Not really the Caucus, no. It was more individual Democrats.

Q. Now, during that period of time up until June of 1973, did you have occasion to use various computer applications in the development of reapportionment plans or concepts with respect to reapportionment?

A. Yes.

Q. And would you tell the Court about that.

A. A system was designed in the State of California which included both demographic data, that is census data, and also political data. The returns from all the precincts were collected; they were matched to the census tracts, and all this data was put into a large data base.

In addition, the geographic coordinates of all the units were also put into the computer.

A very extensive retrieval system was developed which would allow a person to place a map on a digitizer table, and to trace around boundaries of any district or any proposed district or area of a district, and to get very rapid retrieval of the political and demographic data within that district.

Q. Now, if you would very quickly, and without using "digitizers" and all the technical terms, take us from June of '73 to August of 1977, very briefly and quickly; that is, your activities in the reapportionment area.

A. My only other activity in the area of reapportionment in that time in terms of plans was the creation and submission of a sample plan to the special masters for the reapportionment of the California State Legislature.

Q. Did you in that activity work with the special masters, submit materials to them with respect to reapportionment?

A. The Rose Institutes of the State and Local Government submitted the plan, not in cooperation with the special masters.

Q. All right. Now, tell us again, very briefly, what occurred during August of 1977, that brought you to be a staff member of the Mississippi Joint Committee.

A. I received a phone call from you in early August, I believe, inquiring as to whether or not I would be interested in working in a reapportionment in the State of Mississippi.

JUDGE GREEN: Excuse me, what was the year?

THE WITNESS: '77, Your Honor.

JUDGE GREEN: Thank you.

THE WITNESS: After that initial discussion, you requested that I come back to Washington and sit down with a group of legislators and the Attorney General of the State of Mississippi, and discuss my qualifications and some of my ideas concerning how the reapportionment of Mississippi might be handled, technically.

BY MR. LEONARD:

Q. And when were you retained as a consultant to the Committee, approximately?

A. Late August.

Q. Would you tell the Court from late August what your first efforts were in approaching — well, first, define the problem that you were given for the Court, and then tell us how you approached the problem.

A. The problem was to create a plan for submission to the Federal court in Jackson by a late October deadline.

When I first came into the picture, there was certainly no data and no committee staff set up. My first priority was to obtain the necessary data to accomplish the reapportionment, and to put this data into a computer and to program a retrieval system which could be used to sum the statistics for the district and also give information about the individual enumeration districts within the districts.

Q. Did you, in those early days, have discussions with respect to the constitutional and legal and other criteria and standards which you were to follow in the development of reapportionment plans for the State?

A. I did.

Q. What if any written instructions did you receive?

A. I received a memorandum of law from you, which

was a summary of the Supreme Court decision, I believe in May of 1977, and outlined some of the guidelines which the Federal court in Jackson had given in its request for the Legislature to submit a plan.

Q. Now, where did you go to get the data base necessary to develop the base for the drawing of the plan?

A. A set of computer tapes was obtained from the Census Bureau which contained the first and third counts for the State of Mississippi. Some of the data which is necessary for reapportionment is not available in written form, so we had to go onto tape.

Q. And were those official tapes received by you from the Census Bureau?

A. Yes.

Q. If you recall, how were you able to determine that they were official tapes?

A. There was a line of transmission. I don't know the technical term. They were given to somebody who brought them to me, and they certified that this was a tape from the Bureau.

Q. Do you recall who you received the tape from?

A. No, I'm sorry; at this time I don't recall the person from whom I received the tapes.

Q. What did you do with the tapes after you received them?

A. The first thing I did was I took them and had them copied to be assured that if they got damaged I wouldn't lose them. Then I took the tapes up to the University of Mississippi and started working on the data base.

Q. And by working on it, do you mean you inputted it into computers there in Mississippi; is that the idea?

A. Yes.

Q. And how did you then use that data base? Excuse me, let me back up.

Where did you do your work, the reapportioning work?

A. With the exception of the creation of the data base, the reapportionment work was all done in the new State Capitol Building in Jackson, in the committee offices.

Q. And the data base was in Oxford?

A. Yes.

Q. And how did you get the information back and forth?

A. We had a phone line from Oxford, Mississippi, to Jackson, which was hooked to a terminal in our office in Jackson.

Q. So you had a data retrieval system in the Jackson office?

A. Yes.

Q. And who wrote the program, that is the computer program; I guess that's what you call it, for the system?

A. I did.

Q. And tell the Court just very briefly what does that mean with respect to putting the information in and getting it out. Maybe the Court knows that. I guess the Court knows that.

Now, did that data allow you to withdraw information by each legislative district, both Senate and House?

A. Yes.

Q. With respect to the plans, Mr. Hofeller, that are in this lawsuit, have you reviewed the statistical data with respect to these plans?

A. I have.

Q. And did you cause the computer to have a printout of various statistical information with respect to these plans?

A. I either caused it myself or people under my supervision caused it to happen.

Q. Was all of the computer work done under your supervision and control?

A. It was.

Q. Either by you or people picked by you?

A. It was.

[Transcript pp. 120 (L. 1) — 129 (L. 2)]

Q. Now, Mr. Hofeller, would you tell the Court very briefly why the decision was made to proceed to draw the legislative districts based on enumeration districts instead of precinct lines, initially?

A. That decision was made because in our judgment, the judgment of the staff, we could not develop statistically reliable data on the districts if they were developed using precincts as the building blocks rather than enumeration districts as the building blocks.

MR. LEONARD: If the Court please, I'd like to ask the witness to step down, just very briefly, and on this pad of paper show the Court how they went about converting the enumeration district plan to the precinct plan.

I think it would be helpful in background to the Court to show the flow of the plans from the E.D. plan.

JUDGE WILKEY: Very Well.

BY MR. LEONARD:

Q. The question, Mr. Hofeller, is to show to the Court — give the Court an example —

JUDGE WILKEY: Mr. Schwarts, can you and your colleagues see this? Mr. Parker?

MR. PARKER: Yes, sir.

BY MR. LEONARD:

Q. How you went about building the enumeration district plan and then how you converted the enumeration district plan to the E.D. [Precinct] plan and the involvement of the Census Bureau in that conversion?

A. As an example, you would find many precincts in Mississippi that have very irregular shapes and they do not correspond on a one-to-one basis with the enumeration district lines.

So you might have a precinct, let us say, that looks like this.

Q. And that's a precinct now?

A. That would be a precinct.

Then you would have an enumeration district coming in this way and another enumeration district coming in this way and maybe there would be one in the middle of this precinct.

Then there would be another portion of another enumeration district.

These may be terminated somewhere out in a rural area. This was very typical of the city areas of Mississippi. The precincts extend from populated areas way out into rural areas because of the supervisorial apportionments policy in the State.

Q. Let me interrupt. What do the supervisor districts have to do with the configuration of the precincts?

A. In the State of Mississippi, the supervisors in reapportionment attempt to equalize the number of miles of county roads which each supervisor has in his district — this being one of their primary functions, to maintain these roads.

So they will go outside of the incorporated city, the major incorporated city in the district and would divide up the county so these roads are equalized and then also have satisfied the constitutional requirement of one-man/one-vote.

They will have to come into the cities, cutting them up like pies or maybe going through the middle of the cities. They did that in the City of Tupelo, going across the city to try and balance the populations of these districts.

This creates very irregular precincts.

Q. Does the fact that those precincts are irregular have an eventual impact on the shape of the legislative districts?

A. Yes.

Q. Go ahead

A. The use of enumeration districts is necessary because that is the only basis upon which census information is available outside of the metropolitan areas.

Q. Let me just interrupt for just one moment so we get this clear.

These precincts — this precinct that you're referring to was not in existence in 1970 at the time the census was taken; is that what you're saying?

A. Precinct?

Q. The precinct?

A. I really have no knowledge. I think many precincts have been redrawn since 1970. Some may have been there.

Q. But at least there is no census data available for that precinct as such?

A. No, the enumeration districts are designed to cover the amount of territory that an enumerator can enumerate on census day and they have no relationship at all to the

precincts, particularly in Mississippi, because Mississippi precincts don't stop at city limit lines as they might in other states.

The only data available outside the metropolitan area is outside enumeration districts. Therefore, if you wish to ascertain the population of any one precinct, you must allocate the population on one side of the line to another precinct and a portion to the precinct in question.

So a split has to be made of the enumeration district in order —

Q. Who makes that split?

JUDGE WILKEY: Excuse me, I thought I understood that you didn't make the splits because they were too difficult and too inacurate and that you disregarded the precinct data and took the census enumeration areas as your base?

THE WITNESS: Your Honors, the first set of plans that we created for the Legislature were based on the enumeration districts and based them on enumeration districts because of this problem, and because we believed that there would be dispute about the data if we did not go with E.D.'s.

JUDGE WILKEY: That we understand.

THE WITNESS: The Legislature and the Court in Jackson expressed after these plans were submitted a preference to use precinct lines rather than enumeration districts. * * *

BY MR. LEONARD:

Q. Tell the Court when you — where you got the data from and how you went about manipulating that data in order to produce the precinct plans which are now before the Court?

A. We would copy a map from the Census Bureau of that E.D. and we would draw the split on the E.D. and

ship that map up to Jeffersonville to the Bureau of the Census and then they would return to us the total population on one side of that line and on the other side of that line.

Q. Thank you.

Now, Mr. Hofeller, subsequent — you've already indicated to the Court that the Federal court in Mississippi and the Legislature preferred the precinct plan. Quickly tell us what happened from early November, mid-November up to the date that converted these plans from the original E.D. plans to what is before the Court today?

A. There was an E.D. plan produced for the Court and there is a statutory E.D. plan produced, and then we went to work on producing E.D. plans, or excuse me, precint plans, from both of these two original plans.

Sometime in early March of this year we finished the precinct based plan for the Court and submitted that to the Court. Then at the end of March, the statutory precinct plan, which is before this Court, was completed and passed into law.

[Transcript pp. 194 (L. 7) — 199 (L. 25)]

BY MR. SCHWARTZ:

Q. You testified yesterday that your use of census E.D. splits was necessitated when you converted from a E.D. plan to a precinct plan. Did those E.D. splits, which you obtained from the Bureau of Census, contain racial composition information?

A. No.

Q. In other words, anytime in drawing a district it was necessary to split an enumeration district, the information that you got from Census was a total population figure

that would be presiding within that split area that is not wholly contained within the precinct?

A. Yes.

Q. How did you arrive at the racial composition of population within the split E.D.?

A. Proportional.

Q. Would you elaborate on that a little bit?

A. I would divide the number of people in the portion in question by the total population of the entire E.D., and I would take that number and multiply it times the black population, and the total adult population, and the black adult population, and arrive with a proportional figure.

And then I would subtract if it were split two ways, the first figure from the total to get the other side.

[Transcript p. 274 (LL. 1-25)]

A. Dr. Henderson, in his testimony, indicated that he felt that the method of counting the number of residences in the E.D.s was far superior to the geographic method, except of course in the municipal areas where you have the block by block data available.

Q. Now, in your opinion, could the method of doing splits that Mr. Tanner described, result in deviations that would be outside those permitted by the Courts?

A. Yes.

Q. Now, are there any other things in the methodology of Mr. Tanner that lead you to the conclusion that his plan is not satistically credible?

A. Well, I think another important factor is the amount of record that there is in regard to the actual populations of the district. I have yet to see any indication of an E.D.

by E.D., or a census unit by census unit documentation of the split E.D.s.

I think that it's extremely difficult to keep track of all of the E.D.s in the state, over 2,000 of them, going into —

THE COURT: Is that 2,000 E.D.s or 2,000 precincts?

THE WITNESS: Your Honor, there are over 2,000 E.D.s, also. Sometimes they correspond almost on a one to one basis. But the lines are vastly different.

It is extremely difficult to keep track of all these E.D.s, and all these portions of E.D.s, as they are all assigned to various districts, and to insure that nothing is double counted and nothing is left out, and to come up with accurate data.

BY MR. DUNHAM:

Q. And what did you use to insure that you didn't double count and —

A. The computer program which was devised by the state had in it a data base for which only one read could be done for every census unit for the state. It was not possible to draw the same census unit out of the data base for the summation of a plan in the same pass through the program.

In addition, at the end of the printout, there was, of course, the printout of each district, and its deviations and total sum, and there was also a county rectification, so to speak, where the amount of data which was drawn out of the data base for each district for each county was tallied against the actual population of the county.

So that if there was any overage or underage for each individual county in the state, that that could also be discovered at the time of the printout.

Q. So in what part of your opinion does the fact that

Mr. Tanner did not use the computer, you know, count in forming your opinion?

A. Well, I would just be extremely surprised with my experience in drawing many plans in reapportionment, that one could keep track of all those units, and then check out the validity of the assignment of all those units without a printout, and without some assurances that all the sums were adding up correctly.

It's very easy to say well, I have these four counties, and I have divided them five different ways, and all the four counties as a whole add up.

But it's when you start splitting the districts and breaking a large number of E.D.s that these errors can very easily occur.

[Transcript pp. 1457 (L. 1) — 1459 (L. 12)]

Q. So the only experts you have had these discussions with were Mr. Webb and Dr. Morrill, employed by the Joint Legislative Committee on Reapportionment of the Mississippi Legislature, and with Bill Neal, whose statistics you disagreed with, right?

You didn't consult any third parties who weren't involved in this litigation.

A. No, I did not.

[Transcript pp. 1482 (L. 24) — 1483 (L. 6)]

CROSS-EXAMINATION

BY MR. SCADRON:

Q. Mr Hofeller, are you testifying as an expert on census data in this case?

A. Yes.

Q. Have you been offered as an expert witness?

A. I'm not sure that I know the answer to that question.

MR. DUNHAM: Your Honor, we have never asked that he be formally qualified, but we believe his testimony has demonstrated at least as much expertise as anybody else who has testified on the subject in this case.

THE COURT: We'll qualify Mr. Hofeller as an expert if that's what you want, Mr. Scadron.

BY MR. SCADRON:

Q. Well, I'm wondering just what your background would be that would qualify you as an expert in census data.

THE COURT: I think we've gone into that.

[Transcript p. 1493 (LL. 2-19)]

TESTIMONY OF EARL FORTENBERRY

Q. Prior to your going into private practice of law, what did you do?

A. For a period, I was serving as full-time staff Director for the Internal Joint Legislative Committee on Reapportionments in Mississippi. Prior, I was Director of the Legislative Office for the State Senate which was the professional staff, full-time, research and districting staff.

Q. Where did you go to college?

A. Attended Millsaps College in Jackson, and American University here in Washington.

Q. Where did you get your law degree?

A. University of Mississippi.

[Transcript p. 450 (LL. 2-14)]

Q. Now, Mr. Fortenberry, just tell the Court very

briefly how you came to be the staff director for the special committee.

A. Well, serving for the Senate, the Elections Committee was one of the committees for which I did research and drafts, and in the process I had an opportunity two or three different times to work on reapportionment matters.

I had told the Senate that I would be resigning to go into private practice about the time that the invitation from the three judge panel was issued in August of last year. They asked me to help them draw up the necessary legislation to create a joint committee, to memorialize Congress to extend a deadline on a particultr type of census approach, and one or two other things before I left.

As the matter proceeded and the Committee was created, I was asked to stay and serve as staff director for the Committee, which I did full-time until November. And then I worked on a full-time/part-time basis after that

Q. And were you given the authority to hire personnel for the committee?

A. Correct.

Q. How many professional personnel did you hire? I'm not talking about outside experts, but actual full-time staff people.

A. I think during the entire process there were five people. We initially hired two women and one black male. One of the women was an attorney, another had a Master's degree in sociology, and the third, Keith Vincent, was a graduate student at Jackson State. He was recommended to us by Representative Anderson.

We had asked Mr. Anderson to help us find some qualified students. And I think he recommended two, and we hired Keith. Later on the two women resigned.

Q. Before you go on, Representative Douglas Anderson is a black member of the Mississippi House?

A. Correct.

Q. And Keith Vincent was a black graduate student from —

A. Jackson State University. It is a predominantly black urban campus in Jackson.

Q. And you hired Vincent?

A. Correct.

Q. Did you interview another black student?

A. I believe we did.

Q. Did you make an offer to him?

A. I frankly am not sure. He was considering another position at that time, and I don't know whether we got to the point of offering him a position before he took the other one.

Q. Now, with respect to the other two staff members, were either of them black?

A. Betty Monroe was also a black student at Jackson State. Betty was also referred by Representative Anderson.

Q. So to put it in context, of the five professional inside staff members you had during the period of the Committee's work, two of the five were black?

A. Correct.

Q. One was a black woman?

A. Correct.

Q. And you had two other blacks, two other females?

A. Correct.

[Transcript pp. 453 (L. 7) — 455 (L. 18)]

Q. Mr. Fortenberry, when did you begin in your capacity as the staff director for the committee?

A. In August of 1977.

Q. In addition to being the staff director, did you also actively participate in the development of plans of apportionment?

A. Yes.

Q. And for which house?

A. For the Senate.

Q. Early on in this process do you recall having received from me a memorandum? And I now show you Exhibit 31. This was to be your instructions with respect to formulating the plan for the Senate apportionment?

A. Yes.

Q. And is that Exhibit 31 what you received?

A. Yes.

Q. And in addition to that exhibit, did we have at various times during the process, discussions about the legal issues involved in reapportionment, and particularly apportionment of the State of Mississippi?

A. Yes.

Q. And did you read some various opinions, Supreme Court opinions and other opinions about such process?

A. A few. Mostly I relied on the advice of counsel.

Q. That memorandum refers to the dilution of black voting strength. Would you refer to that part of the memorandum?

A. On page 2 it gives a reference, paragraph 4, that there should be no minimization or cancellation of black voting strength.

[Transcript pp. 463 (L. 14) — 464 (L. 18)]

BY MR. LEONARD:

Q. Describe for the Court just briefly the evolution of the reapportionment plans which led up to Senate Bill 3098, which is the subject of this lawsuit.

A. The first plan that was created by the committee, created by the staff and adopted by the committee, was a plan based upon enumeration districts which was submitted to the Federal District Court in Jackson.

That plan formed a basis for a good many of the districts. We subsequently created an enumeration district plan that was called a statutory plan. The deviations we were told could be a little bit higher to take into account factors.

As I remember in November Judge Coleman and Judge Cox and also Judge Russell suggested that we submit a precinct plan to the Court, and we then devised a plan based on precincts to submit to that Court.

Subsequently to that this plan was devised based on precincts, under the statutory criteria that we were given by counsel.

[Transcript pp. 467 (L. 16) — 468 (L. 10)]

Q. Mr. Fortenberry, did you act in any of these proceedings with respect to the drawing of any of these plans with any racial purpose in mind?

A. Only on one or two instances to try to maximize some small concentration of black people, particularly in District 45. The overall population — black population counted very small, but there is one particular area in South Ashburg where there is a good bit of black population, and I tried to get those precincts as best I could in that District 45 so that there would be 25. I think the resulting black population was about 30 percent which is

not very — it is more than it would have had if we had put them out in the — 46 rather than 45.

Q. Let me ask the question a little differently: Did you act at any time in your capacity as staff director and the person who worked primarily in the development of these plans which resulted in Senate Bill 3098, with a racial purpose to deny black people their right to participate in the political process, to vote, to register, to have their vote be an impact on the outcome of elections; stated another say, to minimize or dilute their vote?

A. No.

[Transcript p. 481 (LL. 4-25)]

Q. Were you also concerned about the integrity of county boundaries?

Let me ask you, where the county may contain a population that would be close enough to the ideal, were you concerned that that county be a district in itself? Is this one criteria that you were concerned with?

A. This was a criteria. This was in a memorandum of law given us by counsel. It was, as I understand, in an opinion, or it was a guideline of the federal district court in Jackson, that where you had population sufficient for one or more districts within a county, that they would be created, and that was the reason that we had to work with Warren, Hinds, and Rankin County.

Q. And was compactness important to you, the compactness of the districts? Was this a consideration in drawing these districts?

A. Yes.

Q. And what about the incumbency question? Did you try to avoid pitting one incumbent against another incumbent in drawing these district lines?

A. Only if it did not affect the diminimus deviations or if it did not dilute black vote.

[Transcript p. 492 (LL. 3-24)]

THE COURT: Were these public hearings held pursuant to public notice or was notice by mail?

THE WITNESS: No, sir, we published notice in newspapers around the State; we sent a notice, as I remember, to each circuit clerk along with a copy of the plans being considered. And as I remember, in some areas, radio stations broadcast public announcements about the plans.

The hearings, as I remember, or as I had noted here, were held on October 11th and 12th. And I think notice was published in the plans and were delivered to the clerks about a week beforehand, certainly five days before.

THE COURT: How many people showed up?

THE WITNESS: Your Honor, I can't remember exactly.

THE COURT: You were there, weren't you?

THE WITNESS: Pardon?

THE COURT: You were there?

THE WITNESS: Yes, but I don't think it was more than 25.

THE COURT: All kinds of people, blacks, whites?

THE WITNESS: Yes.

THE COURT: Orientals?

THE WITNESS: No, sir, no orientals. There were leaders, as I remember, from representatives from black groups. I think Ruby Lyle was there and Rims Barber testified.

There was a gentleman from McComb who took a day

vacation to come up and testify, because he objected to Pike County being split in the House.

But just different groups and different types of people that came in. There weren't a lot of people.

THE COURT: How long do the hearing last?

THE WITNESS: We held them open for two days. We allowed people to come and testify for two days. I think we started about 9:00 maybe 10:00 in the morniing and went until noon, took a recess, came back and were there until everyone had had a chance to make a statement.

THE COURT: During those two days, all 25 testified?

THE WITNESS: Yes, sir, as I recall. The hearings were held in the old Supreme Court chambers in the State Capitol which is on the second floor of the building, down at one end. And it was held in the Capitol and people in the state are familiar with the building and where it is.

BY MR. PARKER:

Q. What was the date of those two hearings, Mr. Fortenberry?

A. The first one was on October 11th and 12th.

THE COURT: '77?

THE WITNESS: Yes, Your Honor, 1977.

Then about that same time another proposal for a House plan, House Plan AC, I think if you will remember was being drafted and considered but was not completed in time for the public hearings of October 11 and 12, and another hearing was held on October 18, according to my notes here, just on House Plan AC.

As I remember, similar notice was sent out for that hearing.

[Transcript pp. 528 (L. 15) — 530 (L. 19)]

TESTIMONY OF DELMER DUNN

DELMER DUNN was called as a witness by and on behalf of Plaintiff, and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUNHAM:

Q. Would you state your name, please, sir?

A. My name is Delmer Dunn, D-e-l-m-e-r.

Q. And how old are you, Mr. Dunn?

A. I'm 36 years old.

Q. And where do you reside?

A. I reside at 425 Southview Drive, Athens, Georgia.

Q. Now, where are you presently employed, sir?

A. I'm employed at the University of Georgia in Athens.

Q. And what is your position with the University of Georgia?

A. I am director of the Institute of Government at the University, and Professor of Political Science.

Q. Would you give the Court a brief description of your educational background?

A. Yes. I am a graduate with a B.A. in political science from Oklahoma State University, in Stillwater in 1963, a Master's in political science from the University of Wisconsin in Madison in 1964, and a Ph.D. in political science in 1967 from the University of Wisconsin in Madison.

Q. Now, since you received that Ph.D. in political science, have you done any work in the area of reapportionment?

A. Yes, I have.

Q. And would you describe briefly for the Court what that experience is?

A. In 1971 I became director of the University of Georgia Reapportionment Services Unit, which assisted the House Congressional and Reapportionment, Congressional and Legislative Reapportionment Committee of the Georgia General Assembly in reapportioning Congressional seats and House of Representatives seats in Georgia.

We assisted by getting data from the Census Bureau, providing it in a form that was useful for reapportionment purposes, getting maps of the Census materials so that it might also be used, and then assisted legislators in the use of these materials as Georgia reapportionment plans were produced.

Q. Now, did there come a time when you were approached by representatives of the State of Mississippi to assist them in their reapportionment efforts?

A. Yes, that is true. In August of 1977 I was approached by Mississippi legislators to assist them in reapportionment in Mississippi.

Q. And did you do some work in that area? Did you agree to help them?

A. Yes, I did. And I would say that I did several things: One, I discussed with members of the committee and legal counsel associated with the committee, the kind of data that reapportionment plans might be based upon.

We discussed various ways the committee might work in the formulation of its reapportionment plans. I drew a Senate reapportionment plan at one point.

I assisted also in the drawing of some amendments to what is called the Senate Court Plan, enumeration District Court Plan.

That was, in general, the kinds of things which I did for the Mississippi General Assembly.

[Transcript pp. 545 (L. 10) — 547 (L. 22)]

Q. Would you tell the Court the circumstances under which you drew the plan which you yourself drew and when you drew it?

A. Right. I was instructed by the committee to draw a plan which followed as much as possible the guidelines which had been given to us in the memorandum of law. That is, to use de minimis populations, variations from district to district, not to dilute the black vote, to keep communities of interest together, so far as possible to make a district continuous, make them as compact as possible, and I did draw that plan without knowing where political figures in the state, members of the Senate lived, without knowing where — what plaintiffs and defendants who already had presented prior plans.

[Transcript p. 557 (LL. 12-24)]

TESTIMONY OF CHARLES CLIFFORD FINCH

Q. Governor, did you, before signing the House bill and Senate bill that are the subject of the reapportionment plans now before this Court, did you inquire or seek any input from any black-oriented or civil rights-oriented organizations such as the NAACP, to find out whether these plans afforded as much protection to black voters in your state as did perhaps alternative plans before the Connor Court or any other possible alternative plans?

A. Yes, sir. My staff members. We do have several members of black people on our staff. They were involved in every staff meeting. And these tests were talked about at the staff meetings and especially when our legal staff was involved did these plans meet with the Court's test.

Of course, even though sometimes lawyers disagree, as you know, they were unanimous that it did meet with the test of the Courts and, of course, this is why the case is here.

Sometime you disagree, sir.

Q. Governor, are you aware that the United States Attorney General has interposed an objection to these plans, because they may have the purpose or effect of diluting black voting strength or denying or abridging the right to vote of Mississippi black voters?

MR. LEONARD: If the Court please, counsel ought to frame that at the time that the Attorney General interposed the objection and point out to the witness that that was recently, long after he had signed the bill.

BY MR. SCADRON:

Q. That was after you had signed and approved the plans, are you aware that the Attorney General did later interpose an objection to those plans on racial grounds, generally?

A. No, I am not familiar with that. I would not say that he did not because I just don't know either way.

I do feel that that is everybody's right to object to it. I do feel, and I reiterate, I think it does meet the test, but that is what we are in court for, to see for sure.

Q. You think it meets the test. Is that based on any particular input from any particular black organizations?

A. Yes, sir. I answered that a moment ago, from my staff people that we have on the staff.

Q. Have you learned from your staff whether the NAACP opposes these plans or would prefer these plans over other plans?

A. I have not had any objection from the NAACP to

me personally, or to anyone, to my knowledge. Of course, they would not come to me in all probability.

They would probably have come to me or at least I would think that they would come to me with the open administration that we try to have and especially with the black members on our staff, to object before I signed the bills into law.

I do not recall having one objection from anyone. There were a lot of objections during the debates in the Legislature to the plans when they were being drawn, but they were being modified from day to day and as they were finally drawn, I do not recall having one complaint, sir.

Q. Governor, just before we leave this point, bear with me in order to clarify this one point.

Did you instruct your staff specifically to try to contact the NAACP or any other black-oriented or civil rights-oriented organizations in order to gain input about these plans?

A. Yes, sir.

We did not by organizations, per se, but by individual people in the state that I have relied upon as being competent people.

Q. Could you recall who some of these people are?

A. Yes, sir. Our staff members and our staff members in turn contacted different people.

In fact, I have on my staff a cabinet level position that is called Multi-Culture Advisory Committee. These people are composed of the leaders throughout the state from all walks of life, not necessarily college presidents, business people and generally working people, composed of approximately 40 people.

These people meet once a month. These people were

called, they were consulted on the matter. That doesn't mean that they did not have some complaints.

I am just telling you, I had not received any complaints to the plans that we signed, that the Legislature passed. And I want to reiterate again that maybe some of them did have complaints, but not to me.

[Transcript pp. 299 (L. 18) — 303 (L. 7)]

TESTIMONY OF JOHN TANNER

THE COURT: Well, we haven't had any indication as to what his background is in terms of formal schooling. There has been a brief reference to his prior experience. And if he's going to express an opinion, which he did just a moment ago when he indicated that one plan was inferior to another, why it seems to me we have to have a little more on the record, Mr. Scadron.

BY MR. SCADRON:

Q. Mr. Tanner, when you said inferior, were you looking at the numbers involved? Could you explain what you meant by that to the Court?

THE COURT: Well, before we get to that, let's hear more about Mr. Tanner.

MR. SCADRON: Certainly, Your Honor.

BY MR. SCADRON:

Q. Mr. Tanner, could you describe for the Court your educational background, please?

A. I was educated in the public schools of South Carolina, Ohio, and Alabama. I attended the Indian Springs School. I graduated from the Indian Springs School. I graduated from Dennison University in Granville, Ohio, with a Bachelor's Degree in history in 1971.

I'm currently a student at the Washington College of Law at the American University, and I have over a little year to go to get my JD degree.

THE COURT: Well, I don't suppose that qualifies him as an expert in demographic changes, does it?

MR. SCADRON: We haven't offered Mr. Tanner as an expert, Your Honor. We don't intend to.

THE COURT: All right.

[Transcript pp. 1226 (L. 1) — 1227 (L. 6)]

STATEMENT OF A. F. SUMMER
Attorney General, State of Mississippi

MR. SUMMER: I thank the Court for that privilege, and I don't claim to be the true fact-finder by any means, but I will give you my version of that since I participated in it throughout.

First in response to the Government's statement just now, one of the last things we did before negotiations broke off was I had conversations with Mr. Gerald Jones in the Civil Rights Division in regard to the settlement.

He refused, as did Mr. Parker, to enter into a part of what the Legislature had been led to believe was part of the settlement, and the settlement addressed itself to the case now before the three-judge panel in Mississippi. It had absolutely nothing to do with this case.

The plaintiffs and the Government have been aware that the Legislature had mandated myself in the law to pure exhaust every remedy under Section V in regard to this statutory plan, so there was no question in their mind that this lawsuit would be filed.

It was filed because the Legislature made it a part of the law when they passed the statutory plan. So they have known since January that this suit would be filed. They knew it could not be filed until it was submitted to the Attorney General in order for him to either approve or disapprove.

We did not expect approval from them because they have been plaintiff in the lawsuit for quite some time. The matter began to slow down, but it was actually stepped up when Judge Coleman, of the 3-judge panel in Mississippi, called a conference of the attorneys involved in that case there.

Giles Bryant from my office was there; Mr. Frank Parker was there, and the U.S. Attorney was there representing the Department of Justice at that conference.

At that conference Judge Coleman urged all parties to see if they could not reach a compromise. I believe this was on or about August the 2nd, if they could not reach a compromise on or before August the 20th, that the 3-judge panel would institute its own plan.

They had a plan drawn by its master. And at that conference Judge Coleman stated most emphatically that he probably would prepare a plan that would reduce the Legislature to 90 members, and the Senate to 45 members, so that when you created the 1980 plan, you only had to create a Senate district, and you had two representatives settled at that point, because of the numbers involved.

Judge Coleman is the one that suggested that part of the language, if we were to get together, would be that that compromise, the compromise of that case, would not be admitted as evidence in this case up here, that it would be just what it was, a compromise of the court case, having absolutely nothing to do with the statutory case.

I cannot possibly conceive how it could have been kept

a secret from this Court, or how anyone would have wanted to have kept it a secret from this Court, because it is a parallel animal traveling along the path with this lawsuit, because I think we are all aware that the Supreme Court has said that a statutory plan is preferable to a court plan.

So we're talking about two different animals entirely. When Judge Coleman became as emphatic that he did, and I think he was entitled to it because of the many years that this case has been in his court, that information then was transmitted to the Legislature by way of correspondence, asking them, telling them what Judge Coleman's plan would probably do, by way of drawing a court plan, which without doubt drew a number of yes's to the compromise that was suggested.

The joint legislative committee met, it was presented to them in the very spirit that Judge Coleman had presented it to the three parties at the conference, that there was really no alternative, either the legislative joint committee not being prevented, because it was not a statutory plan, it was a resolution, so they could recommend.

A majority spoke to it; a great number of them did not respond at all. But because there was no alternative than an unknown, they said yes, we would proceed with that, provided the language of Judge Coleman would go in there that a court plan would not be used as a part, or be used to compare a statutory plan, which was his understanding.

That is when the negotiations broke down, because then the plaintiffs refused to put that language in there. It's still pending before Judge Coleman, he wrote a very nice letter, saying that he would call another conference, since it would be of no harm to have two plans available.

But that is my version of it, if the Court please.

JUDGE WILKEY: Thank you, Mr. Summer.

MR. SUMMER: I certainly want this Court to be aware

of the fact that we did not believe in the first place that it can be done, and certainly we did not have in mind trying to keep such a well known secret a secret from this Court.

JUDGE WILKEY: Thank you, Mr. Summer. We can understand the impact of Judge Coleman's suggestion that his plan embrace a reduction of both houses of the Legislature and on the sitting members of that Legislature, or any other legislature, or any other legislature so notified.

[Transcript pp. 360 (L. 1) — 363 (L. 20)]

TESTIMONY OF AARON HENRY

THE COURT: [Y]ou wouldn't have had a problem of getting heard, would you?

THE WITNESS: No, I don't think I would have had a problem getting heard, frankly. I've got a reputation of knocking down most doors that are closed.

THE COURT: Yes. And if you had really wanted to push it a little you could have gotten in there and said anything you want.

THE WITNESS: Yes. But you know, * * * I would prefer to take my chances within the Court system on the question of reapportionment.

[Transcript pp. 769 (L. 23) — 70 (L. 11)]

THE COURT: But that's a choice that you yourself made.

THE WITNESS: Well, that's a position that I had learned . . . through the years.

THE COURT: But one of the contentions that has been made in this case is that black leaders weren't given an opportunity to participate. And what I'm trying to point out is that at least as far as you, Mr. Aaron Henry was

concerned, that you could have participated if you had wanted to.

THE WITNESS: I think I could have, yes, if I had decided to, yes.

[Transcript pp. 771 (L. 18) — 72 (L. 13)]

Q. And you are really an advisor to Governor Finch . . .

A. All right. Well, I have access to the governor at anytime that I desire.

Q. This is what I want to bring out.

A. Right.

Q. That's what I want to say.

A. Right.

Q. And you know that the Governor called the legislature into session to pass a reapportionment plan?

A. Yes, I know that.

Q. Did you ever discuss it with him, Dr. Henry?

A. No, I really didn't. You know I think that . . . you all were just wasting money and killing time, and all that.

[Transcript pp. 779 (L. 14) — 80 (L. 5)]

Q. So really, Dr. Henry — and the final matters are not concerned at this point in time, as a result of what your conditioning is after the years of doing what you have done, you really feel regardless of what the makeup of the legislature may be, that it's your preference to go through the courts and not let the legislature act on things —

A. You know, generally, that's my feeling. * * *

Q. It is my understanding that you prefer that in other matters as well as reapportionment?

A. Sure.

MR. SUMMER: That's all we have, Your Honor.

[Transcript pp. 801 (L. 4) — 02 (L. 4)]

THE COURT: I have a couple of questions. I was going to ask them a long time ago, but I think Mr. Summer brought it out at the end.

But if you had two identical plans, one the statutory plan and one the same plan submitted by the Court, you would prefer the Court plan to the legislative plan.

THE WITNESS: I would for this reason, Your Honor.

THE COURT: Well, I think you have stated why.

THE WITNESS: Well, I think this is a further reason.

THE COURT: You have more confidence in the courts than you have in the Mississippi Legislature.

THE WITNESS: But there is still a further reason. I think that once the people of Mississippi, black and white, are able to come together around a particular plan and say this is what we would accept, I think that that kind of reaction would give all of us more of a desire to try to make it work. * * *

[Transcript pp. 802 (L. 15) — 03 (L. 7)]

APPENDIX E

TRIAL EXHIBITS IN THE SECTION 5 CASE

PLAINTIFF'S EXHIBIT 31
(Without Attachments)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3830 (A)

PEGGY J. CONNOR, et al.,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

CLIFF FINCH, et al.,

Defendants.

MEMORANDUM OF LAW

After remand from the United States Supreme Court, the United States District Court for the Southern District of Mississippi (3-Judge District Court) on August 1, 1977 entered an order wherein the Court, among other things, directed the private plaintiffs and the Department of Justice "to file within ninety days, and sooner if possible, a complete plan for re-districting the Mississippi State Senate and the State House of Representatives agreeably to the standards enunciated by the Supreme Court and, *as far as constitutionally permissible, agreeably to the guidelines*

enunciated by this Court, 419 F.Supp. at 1076." [Emphasis added]. The Court further extended an invitation to the Mississippi Legislature to file a plan of its own.

The guidelines enunciated by the District Court were as follows, to-wit:

> 1. If a county has more than enough population for the election of a Representative or Senator, then there shall be one complete district within that county, thus at least one Senator or Representative will be chosen solely by that county. In practical effect this will largely preserve the integrity of county boundaries and conform, to a degree, with the state policy on that subject, *Mahan v. Howell, supra.*
>
> 2. Except where two or more districts may properly be set up *within* the same county as authorized by Mississippi Constitution, Section 254, no county will be split into more than two segments.
>
> 3. Any departure from these guidelines will be allowed to occur in those rare instances required to attain reasonable contiguity, a tolerable equality of population, or an acceptable degree of compactness.
>
> 4. There shall be no minimization or cancellation of black voting strength. Any apparent dilution in any particular locality will occur only when dictated by the necessity for drawing district lines so as to adhere as closely as reasonably possible to the population norm while maintaining contiguity and a reasonable degree of compactness.
>
> 5. The population variances are to be as near *de minimis* as possible, bearing in mind any existing unusual circumstances and the narrow mathematical restrictions imposed by a single percentage point.
>
> 6. Obviously, shifts could be made in some districts

> to make them more nearly *de minimis* but the bulge here, or the contraction there, cannot overlook the necessity for fitting one set of 52 blocks (Senate seats) and another set of 122 blocks (House seats) within immovable precinct, beat, county, and state boundaries. Nowhere can a "domino" effect be more quickly encountered.
>
> 7. The population figures of the 1970 Census will be used as the basis for this reapportionment. This is the only definite data available. Yet, the Court is well aware of the continuing population shifts in Mississippi. The Census Bureau officially estimates that between 1970 and July 1, 1973 (the latter date being now more than three years past), the population of DeSoto County increased 28.0%, both Jackson and Rankin Counties increased 18.1%, and so forth. (See Table for the entire State attached to this opinion). We cannot use the 1973 official population estimates because they do not include beats and precincts.

On appeal the Supreme Court of the United States noted that:

> The plaintiffs do not really challenge the criteria enunciated by the District Court but rather argues that the court failed to abide by its criteria in putting together the reapportionment plans. 52 L.Ed. 2d 473.

The Supreme Court did not indicate any disagreement with the criteria enunciated by the District Court, but stated that the District Court had not properly applied its own criteria.

The Court had earlier stated that it did not reach all the complicated issues raised by the appellants for the reason that the court determined that the reapportionment plan ordered by the District Court failed to meet the most elemental requirements of the equal protection clause, i.e.,

that legislative districts be "as nearly of equal population as is practicable." 52 L.Ed. 2d 470.

The Court reiterated that in only two important respects the District Court will be held to stricter standards in accomplishing its task of formulating a reapportionment plan than will a state legislature. Such being that "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than de minimis variation."

Continuing and to the same effect, the Court reaffirmed its prior position.

> This court has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. p. 474.

The Court admonished that Mississippi's historic policy against fragmenting counties is insufficient to overcome the strong preference for single-member districting that the Supreme Court originally announced in this case sub judice.

After noting that the Senate plan contains a maximum deviation from population equality of 16.5% and the House plan contains a maximum deviation of 19.3%, the Court found that:

> [S]uch substantial deviations from population equality simply cannot be tolerated in a court-ordered plan, in the absence of some compelling justification.

The Court quoted from its earlier language in *Chapman v. Meier*, 42 L.Ed. 2d 766:

> With a court plan, any deviation from approximate population equality must be supported by enunication of historically significant state policy or unique features . . . [A] court-ordered reapportionment plan

> of a state legislature . . . must ordinarily achieve the goal of population equality with little more than de minimis variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

The Court emphasized that the above mentioned deviations "can hardly be characterized as de minimis."

Although the Supreme Court stated that it did not reach the more particularized challenges to certain aspects of the reapportionment plan made by the plaintiffs, i.e., challenges based upon claims that the plan as to certain districts impermissibly dilutes Negro voting strength, the Court determined that it was appropriate to give some further guidelines to the District Court with these challenges in mind. The court noted the plaintiffs assertion that the District Court departed from its neutral guidelines and such departures had the apparent effect of scattering Negro voting concentrations among a number of white majority districts, and the District Court's failure to adequately explain its adoption of irregularly shaped districts when alternative plans exhibiting contiguity, compactness and lower or acceptable population variances were at hand. The Court mentioned several districts, and in particular the Senate districts of Hinds County. At this juncture, the Court noted that there is no long standing state policy mandating separate representation of individual beats in the legislature. The Court did emphasize that Mississippi has 2,094 voting precincts "each of which is sufficiently small as the basic voting unit to allow considerable flexibility in putting together legislative districts."

In concluding, the Supreme Court advises the District Court that:

> It is therefore imperative for the District Court, in

drawing up a new plan, to make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges. In view of the serious questions raised concerning the purpose and effect of the present decree's unusually shaped legislative districts in areas with concentrations of Negro population, the District Court on remand should either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished. p. 480-481.

This the 7th day of September, 1977.

Respectfully submitted,

/s/ Jerris Leonard
JERRIS LEONARD, COUNSEL
Special Joint Legislative Committee
on Reapportionment

CONCUR:

A. F. SUMMER, ATTORNEY GENERAL
OF MISSISSIPPI

/s/ Peter M. Stockett, Jr.
BY: PETER M. STOCKETT, JR.
ASSISTANT ATTORNEY GENERAL

PLAINTIFF'S EXHIBIT 33

JACKSON DAILY NEWS - October 9, 1977

PUBLIC NOTICE

NOTICE OF PUBLIC HEARINGS
ON PROPOSED MISSISSIPPI
REAPPORTIONMENT PLANS

The Special Joint Legislative Committee on Reapportionment will conduct public hearings on proposed plans for the reapportionment of the Mississippi Legislature commencing on Tuesday, October 11, 1977 at 10:00 a.m. in the old Supreme Court Chamber, New Capitol Building, Jackson, Mississippi. Copies of the plans are available for public review in the office of the Circuit Clerk of each county. The public is requested to review the plans and to present any testimony they may desire to the committee during the public hearings.

PLAINTIFF'S EXHIBIT 34

PRESS REGISTER
Clarksdale, Mississippi

DAILY
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Jackson, Mississippi 39211

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PUBLIC NOTICE

NOTICE OF PUBLIC HEARINGS ON PROPOSED MISSISSIPPI REAPPORTIONMENT PLANS

The Special Joint Legislative Committee on Reapportionment will conduct public hearings on proposed legislative plans for the reapportionment of the Mississippi Legislature commencing on Monday, November 28, 1977, at 11:00 a.m. in the old Supreme Court Chamber, New Capitol Building, Jackson, Mississippi. The hearings will reconvene at 6:30 p.m. for those who cannot appear during the day. Copies of the plans are available for public review in the office of the Circuit Clerk of each county. The public is requested to review the plans and to present any testimony they may desire to the committee during the public hearings.

PLAINTIFF'S EXHIBIT 47

MISSISSIPPI HOUSE VOTE ON H.B. 1491

September 26, 1978

TO WHOM IT MAY CONCERN:

This is to certify that the attached is a true and accurate copy of the vote taken in the House of Representatives on House Bill 1491, Regular Session 1978, on March 23, 1978, and entered in the House Journal on that date.

Mississippi House of Representatives

/s/ C. B. Newman
C. B. NEWMAN, Speaker

ROLL CALL

Mississippi House of Representatives

C. B. NEWMAN, SPEAKER

YEA	YEARS	NAY

DATE 3-23-78 NECESSARY FOR PASSAGE ____ BILL HB1491

YEA 82 71 PRESENT 1 AMENDMENT

NAY 28 ABSENT 3 MOTION

ABRAHAM	Y		GORDON	Y		NUNNALLY	Y	
ANDERSON, D. (31st)		-	GRIST	Y		O'BEIRNE	Y	
ANDERSON, R.G. (31st)	N		HALBROOK	Y		O'KEEFE	Y	
ANDERSON, R.E. (32nd)	N		HALL	Y		OWENS	Y	
ANDREWS	Y		HARNED		N	PEARSON	Y	
ARRINGTON	N		HAVENS	Y		PENNEBAKER	Y	
ATKINSON	Y		HAYNES	Y		PERRY	Y	
BANKS		P	HENDRY	Y		PIERCE	Y	
BAREFIELD	Y		HERRING	Y		POINDEXTER		-
BENJAMIN	Y	N	HOLLINGER	Y		PRESLEY	Y	
BLESSEY	Y		HOLLINGSWORTH	Y		PRICE	Y	
BLOUNT	Y		HOLMES, J.S. (29th)	Y		RANEY	Y	
BROOKS	Y		HOLMES, C. (38th)	Y		RICHARDSON	Y	
BROWN	Y		HORNE		N	ROGERS		
BRYAN	Y		HUGGINS	Y		SANDERSON		N
BUCHANAN	Y		HUGHES	Y		SCOPER	Y	
BUCKLEY	Y		JACKSON	Y		SHUMAKE	Y	
BUELOW	Y		JOHNSON, J.E. (4th)	Y		SIMMONS		N
BURKES		N	JOHNSON, L.C. (28th)	Y		SIMPSON	Y	
CAMPBELL	Y		JOLLY		N	SMITH, H.L. (34th)	Y	
CANON	Y		KILPATRICK		N	SMITH, J.L. (43rd)	Y	
CAPPS	Y		LAMBERT	Y		SMITH, W.O. (43rd)	Y	
CASE	Y		LEVI	Y		STENNIS	Y	
CHAMBLISS	Y		LIPPIAN	Y		STRINGER		N
CLARK, R.O. (2nd)	Y		LIVINGSTON		N	STUBBS	Y	
CLARK, R.G. (16th)	Y		LONG		N	SUMNER	Y	
COLEMAN	Y		LYNN	Y		TEDFORD		N
COMPRETTA		N	MABRY		N	TURNER	Y	
COOK	Y		MANNING	Y		WALMAN	Y	
COSSAR	Y		McCALLA		N	WELLS	Y	
CROSS		-	McCRARY	Y		WILBURN	Y	
DEATON	Y		McDADE		N	WILKERSON	Y	
DISHAROON		N	McINGVALE	Y		WILLIAMS, C.V. (10th)	Y	
DOLLAR	Y		McINNIS	Y		WILLIAMS, K.O. (11th)		N
DOXEY	Y		MERIDETH	Y		WILLIAMS, G.B. (13th)	Y	
EDWARDS	Y		MILLER		N	WILLIAMSON	Y	
ENDRIS	Y		MILLETTE	Y		WISEMAN	Y	
FERGUSON	Y		MONTGOMERY	Y		MR. SPEAKER	Y	
FOOSHEE	Y		MORROW	Y				
FORTENBERRY		N	NEAL	Y				
GILBREATH	Y		NEBLETT		N			
GOLLOTT	Y		NIPPER	Y				

DEFENDANT - INTERVENOR'S EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3830 (A)

PEGGY J. CONNOR, et al.,

Plaintiffs,

vs.

CLIFF FINCH, et al.,

Defendants.

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

PLAINTIFFS' SECOND REVISED PROPOSED COURT-ORDERED PRECINCT PLAN FOR THE MISSISSIPPI LEGISLATURE

Plaintiff, by their attorneys, pursuant to the direction of the Court as transmitted by letter dated February 20, 1978 from Mr. W. D. Neal, Special Master, to counsel for the plaintiffs, submit herewith their Second Revised Proposed Court-Ordered Precinct Plan for the redistricting of the Mississippi Senate and House of Representatives. This Second Revised Plan follows the criteria set out in the opinion of the United States Supreme Court of May 31, 1977, and this Court's Order of August 2, 1977. This Second Revised Plan substantially follows the boundaries of the districts set out in our Revised Precinct Plan, filed February 14, 1978, with necessary corrections required

by the comments of the Special Master in his letter of February 20, 1978.

As corrected, Plaintiffs' Second Revised Plan fully complies with the criteria established by the Supreme Court and this Court as follows:

* * *

CERTIFICATE OF SERVICE

I certify that I have this day mailed, postage prepaid a copy of the foregoing Plaintiffs' Second Revised Proposed Court-Ordered Precinct Plan for the Mississippi Legislature to the following:

Hon. A. F. Summer
Mississippi Attorney General
Post Office Box 220
Jackson, Mississippi 39205

Jerris Leonard, Esquire
Leonard, Cohen & Gettings
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Gerald W. Jones, Esquire
Frederick J. McGrath, Esquire
Civil Rights Division
United States Department of Justice
Washington, D.C. 20530

John D. Haynes, Esquire
Post Office Box 1
Baldwyn, Mississippi 38824

Mr. William D. Neal
1137 St. Ann Street
Jackson, Mississippi 39202

This the 22nd day of March, 1978.

/s/ Frank R. Parker
FRANK R. PARKER

APPENDIX F

DEPOSITION TESTIMONY IN THE SECTION 5 CASE

DEPOSITION OF DREW S. DAYS III

Q. Now, do you know whether the Attorney General of the United States ever saw the letter?

A. I do not have any conclusive knowledge that he saw it, but it is my understanding it was brought to his attention.

Q. Now, on what is that understanding based?

A. It is my recollection that the letter was referred from the Attorney General's office down here.

Q. Well, was the Attorney General in the country at the time?

A. I believe he was in the country, yes.

Q. So it is your feeling that the Attorney General —

A. On second thought, I am not certain that he was in the country on July 27.

Q. He was in Australia, wasn't he?

A. He was in Australia, yes.

Q. What I am trying to find out is: do you have any reason to believe that the Attorney General may not have seen this letter from the Attorney General of Mississippi?

A. I think that's right, he probably did not see the letter.

Q. So you have to go to more than just how many districts exist and what percentage of black voters happen to be in those districts.

A. Well, I'm saying several things. First, that I'm not prepared to conduct an on-the-spot analysis of your exhibit that I have not seen before.

Q. Well, isn't that in the Section 5 submission, Day's exhibit six?

A. I have not evaluated everything in the Section 5 submission. That's what I have staff to do.

Q. Well, it doesn't make one plan, per se, better than another because one has got 31 black majority voting age population seats and another one has got 26, does it?

A. No necessarily.

Q. That fact alone doesn't make one plan better than another in your eyes.

A. No, not necessarily. There are other factors that one would have to consider, as I've indicated.

Q. As to why the difference.

A. Well, why the difference, and also whether the differences in practical terms are significant. That is, there might be a change in the number of so-called black voting age population districts, but if one looks behind that and looks at what in fact has gone on in those districts, what the history of those districts has been, what we know about block voting, what we know about registration, those figures could take on an increased or decreased significance.

Q. All of the factors being equal in a 122 member legislature, do you believe the difference between 31 and 26 is significant?

A. If there are 31 districts that have black voting age majority —

Q. (Interposing) Majorities as opposed to 26.

A. I would think, standing alone, that that might be an improvement, yes.

Q. Thirty-one would be an improvement over 26.

A. It's more than 26. Yes.

Q. It's an improvement, but is it a significant — all the factors being equal, is it a significant factor? Is it significant enough to suggest a racial discriminatory purpose on the part of the drafter?

A. All other things being equal?

Q. Yes.

A. I think that one would have to conclude that — by all other things being equal, do you mean that the districts are not carved up and they're compact and contiguous, and there's not wide deviations from one district to another?

Q. By all things being equal, I mean that the quality from the black standpoint of the 26 is just as good as the quality from the standpoint of the 31. In other words, the population is as good, the participation is good, the process is open —

A. (Interposing) The lines are as good and so forth.

Q. That's right. And all I'm talking about is that the difference between 31 and 26, is that significant enough to suggest a racially discriminatory purpose in a 122 member house?

A. It's very significant. And that's all I can say. It's something that I think would be very important evidence in determining whether there was any indication of discriminatory purpose or a lack of discriminatory purpose.

Q. Do you think it would be a piece of evidence, however, that would cut towards proving that there was a racially discriminatory purpose? In other words, it would tend to prove that there was a purpose to racially discriminate, as opposed to proving that there wasn't.

A. You mean, if the legislature produced a plan that had 31 district voting age block —

Q. (Interposing) No, if they produced a plan that had

26 black majority, when there was a possibility, a way they could have drawn it to get 31, do you think that that five seat difference is significant enough to suggest a purpose, you know, an improver purpose under Section 5?

A. Standing alone, it is not, but it is a piece of evidence.

Q. All right.

[Days Deposition pp. 112 (L. 5) — 115 (L. 18)]

DAYS EXHIBIT 1

July 26, 1978

Honorable Griffin B. Bell
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

Dear Judge Bell:

For several years, Mississippi, the Department of Justice, and the federal courts have struggled with the problem of fashioning an apportionment plan for our state legislature. A three-judge federal court in Mississippi [1] is currently attempting to fashion a reapportionment plan based solely on single-member districts. *Connor v. Finch*, C/A #3830 (A) (S.D. Miss.). The court has before it four (4) plans — one proposed by the plaintiff, one proposed by the Department of Justice as plaintiff-intervenor, one proposed by the Special Master, and one proposed by the Mississippi Legislature. The parties, with prodding from the court, are attempting to work out an agreement on the final configuration of a court-ordered apportionment. In all probability,

[1] The court is comprised of Circuit Judge Coleman and District Judges Russell and Cox.

these discussions, if left to run their course, will result in a hybrid with none of the three plans being adopted in toto.

We believe it to be preferred that the citizens of Mississippi, through their elected representatives, draw political boundaries rather than the courts, the Department of Justice, a special master, or special interest groups. Legal precedent supports this view. *Gaffney v. Cummings*, 412 U.S.C. 735, 751 (1973); *Wise v. Lipscomb*, — U.S. — #77-529, decided on June 22, 1978. Indeed, legislatures are given a greater latitude in fashioning an apportionment plan than are courts. *Chapman v. Meier*, 420 U.S. 1, 26-27 (1974); *Wise, supra.*

We submitted a statutory apportionment plan to the Justice Department on June 1, 1978, for your approval pursuant to Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). This plan is premised entirely on single-member districts. It is a sound one-person, one-vote plan of apportionment and gives recognition to concentrations of potential black voting strength within the state. Under this plan, approximately half of the state's voting age black population (which is 31% of the voting age population in Mississippi) has been compacted into 25% of the legislative districts. Anything more to concentrate the black vote, in my opinion, is not required by the Constitution or by Section 5.

In essence, Mississippi has come up with the best apportionment plan, in all respects, in the United States. It was crafted by experts, who had worked in legislative apportionments in other states and who were guided by the Office of the Attorney General of Mississippi and former Department of Justice Assistant Attorney General for Civil Rights, Jerris Leonard, retained by the legislature. The legislature followed the advice of the experts and its counsel. The members were instructed that no changes requested by them would be implemented when to do so would dilute

black voter concentrations or cause unacceptable population variances from the computed norm.

By any test for comparison, the 1977 statutory apportionment is superior to the 1975 court-ordered plan which the present legislature was elected. No retrogression from the treatment of minorities in past plans is all that is required to pass Section 5 muster, *Beer v. U.S.*, 425 U.S. 130, 141 (1975), and we have gone further and actually improved the treatment of minorities over what the three-judge court ordered in 1975. Nor can anyone rationally argue that the new plan was devised for the purpose, or will have the effect, of "abridging the right to vote on account of race or color."

Our present concern is that the lingering effect of differences between Mississippi and the Department of Justice during the apportionment litigation of the past and present not affect fair and impartial consideration of our Section 5 application. We feel that it may be too great a burden and place your Civil Rights Division in an awkward position if they are asked to make a determination on the acceptability of our statutory plan when embroiled in litigation on the same subject matter. This is so because to approve our Section 5 statutory plan, the Civil Rights Division would have to abandon the plan it has been vigorously advocating before the three-judge court in Mississippi.

The legal framework of a Section 5 proceeding is significantly different from that of parties on equal footing suggesting alternative plans to a court doing its own apportionment. It is our position that if our plan is an improvement over the plan used in preceeding elections, the fact that the Department of Justice might prefer some other plan as being more advantageous for some purpose or goal it is striving to achieve is irrelevant and cannot be the basis for withholding Section 5 clearance. In any event, the

characteristics of our statutory plan do not differ significantly from plans being urged upon the three-judge court from the standpoint of black voting strength.

We request a fresh perspective on our Section 5 submission. We respectfully request an opportunity to meet with you and have you decide whether the statutory plan enacted by our legislature denies or abridges the right to vote of any citizen in Mississippi on account of race.

Because the sixty (60) day period for review of this plan expires on July 31, 1978, we offer a ten (10) day extension of the July 31 date so that the meeting we request can be held at your convenience after you have had a chance to review the matter with your staff. At that time, we could present to you personally supplemental information which, although not necessary to sustain our submission, will more fully explain our position. Based upon our agreement with Gerald Jones that a final decision will, in any event, be forthcoming no later than August 10, 1978, it is our understanding that we would not be triggering another sixty (60) day period.

Mississippi has worked hard, and in good faith, to comply with the law. It is a matter of importance to Mississippi that it be able to control its own affairs and destiny like any other state so long as it complies with mandates of the Constitution. We believe we have so complied.

Yours faithfully,

/s/ A. F. Summer
A. F. SUMMER
Attorney General

AFS:sac

DEPOSITION OF DAVID HUNTER

A. As I recall he was at first in a meeting I believe with the Attorney General who'd just returned from Australia. When he came back from that he went into his

office and presumably looked at the letter and my understanding is that he had a phone call with Mr. Eagan, the Assistant Attorney General, to discuss it and then he signed the letter and brought it out to give us.

Q. What time was that?

A. This must have been towards seven o'clock.

Q. All right.

A. Maybe between 6:30 and, and 7:00.

Q. Somewhere between 6:30 and 7:00. Would 6:45 seem fair to you?

A. Yes.

Q. Okay, and then what did you do?

A. Then I date-stamped the letter there. I borrowed the date-stamp from Gloria, the secretary to Mr. Days.

Q. Was she there?

A. She was there.

Q. And, you said, "Can I have your date stamp?"

A. Yeah, and I remember now that it's my stamping because I didn't do a very good job of it. I, I smudged it.

Q. Okay, and then what did you do with it?

A. Then I believe a, a Xerox copy was made of the, the signed copy, —

Q. Uh-huh.

A. — and I took the, the file back to my office and there I, I put the original in an envelope and sealed the envelope.

Q. Had the envelope already been prepared?

A. Yes.

Q. Who stamped the date on the file copies?

A. Okay, I stamped the date on the original and on the courtesy carbon copy that goes with it. I also stamped a date on the yellow records copy that is our official records copy and we have, as you can see from Jones Exhibit 1, a number of carbons that are made, but it is my practice when I'm the person date-stamping after hours that I date-stamp the original and the records copy and will leave the multiplicity of carbons to the, to the secretary to do the next morning, so I don't believe that I date-stamped all of them.

Q. Okay, but you date-stamped at least one?

A. I date-stamped the original and the records copy, at least.

Q. So, as, as, as you recall at approximately 6:45 you received the letter from Mr. Days; is that correct?

A. Yes.

Q. You borrowed the, you then borrowed a date-stamp from his secretary and stamped the signed copy and the courtesy carbon copy.

A. And, I believe the records copy.

Q. And, —

A. Though, possibly I did that back at my office, but I think that —

Q. Well, there's a different stamp on this one.

A. Well, see, this copy, Jones Deposition Exhibit Number 1 is a Xerox of the carbon marked for Tanner —

Q. Uh-huh.

A. — that I probably did not stamp, myself, but left that for —

Q. That was stamped the next day?

A. — a clerical staff to stamp.

Q. So, you went back to your office and you put the letter in an envelope.

A. That had been prepared.

Q. — that had been prepared?

A. Yes, sir.

APPENDIX G

DOCKET SHEETS AND PLEADINGS IN THE SECTION 5 CASE

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 78-1425 Preceding PAGE ___ OF ___ PAGES
STATE OF MISSISSIPPI	UNITED STATES OF AMERICA	

DATE	NR.	PROCEEDINGS	
		PARTIES	COUNSEL
		STATE OF MISSISSIPPI Plaintiff	Jerris Leonard 1700 Pa. Ave., N. W. 20006 Tele: 872-1095
		vs.	
	1)	UNITED STATES OF AMERICA	Jeremy I. Schwartz Civil Rights Division U. S. Dept. of Justice 20530 Tele:
	2)	GRIFFIN B. BELL, Attorney General of the United States, individually and in his official capacity	-do-
		Defendants	
		and	
		AARON E. HENRY	Richard S. Kohn 733 15th St., N. W. 20005 Tele: 628-6700
		HENRY J. KIRKSEY	
		MRS. MARY HIGHTOWER	
		JOHNNIE E. WALLS, JR., Esq.	-do-
		CHARLES VICTOR McTEER, Esq.	-do-
		FRED L. BANKS, JR., Esq.	-do-
		DAVID JORDAN	-do-
		JAMES G. WINFIELD	-do-
		BENNIE G. THOMPSON	-do-
		BARNEY SCHOBY	-do-
		Defendants-Intervenors	

DIST.	OFF.	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	23	$ OTHER / NEAREST $1,000	NUMBER	DEM.	YR.	NUMBER
090	1	78	1425	08	01	78	2	441	1			9049		78	1425

PLAINTIFFS

STATE OF MISSISSIPPI

PRATT, J.

GREEN,J.- USDC
WILKEY,J. -USCA

DEFENDANTS

1) UNITED STATES OF AMERICA

2) GRIFFIN B. BELL, Attorney General of the United States, individually and in his official capacity

(SEE PRECEDING PAGE FOR COMPLETE CAPTION)

CAUSE

Declaratory judgment under Voting Rights Act of 1965 - 28 USC 2201.

jmv

ATTORNEYS

Jerris Leonard
1700 Pa. Ave., N.W. 20006
Tele: 872-1095

1 & 2: Jeremy I. Schwartz
Civil Rights Division
U.S. Dept of Justice 20530
Tele:

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/78)

DATE	NR.	PROCEEDINGS
978		
Aug	01	COMPLAINT, appearance.
Aug	01	SUMMONS (3) and copies (3) of complaint issued; ~~Atty Gen ser 8-3-78~~ U.S. Atty ser 8-3-78
Aug	01	APPLICATION by pltf. for Three-Judge Court; memorandum.
Aug	03	FIRST Amended Complaint by pltf.
Aug	07	APPLICATION for three-judge Court. CORCORAN,J.
Aug	07	DESIGNATION of the Honorable United States Circuit Judge Malcolm R. Wilkey and the Honorable United States District Judge June L. Green, to serve with the Honorable United States District Judge Howard F. Corcoran, as members of a three-judge Court to hear and determine this case. WRIGHT,C.J. U.S. Court of Appeals
Aug	08	APPLICATION for three-judge Court. PRATT,J.
Aug	10	ORDER sua sponte that the designation of judges to serve on three-judge Court entered 8-7-78 is vacated. WRIGHT, C.J. U.S. Court of Appeals
Aug	10	DESIGNATION of the Honorable United States Circuit Judge Malcolm R. Wilkey and the Honorable United States District Judge June L. Green, to serve with the Honorable United States District Judge John H. Pratt, as members of a three-judge Court to hear and determine this. WRIGHT,C.J. U.S. Court of Appeal
Aug	11	MOTION By Pltff. for a Speedy Hearing on the Merits;Memorandum; Table of Contents; Table of Authorities; Exhibits A & B.
Aug	23	ORDER filed Aug. 21, 1978 directing the filing of a response to the complaint be filed on or before Sept. 1, 1978 and all discovery by both parties commence immediately and the response period allowed under Rules 33, 34 and 36 of the FRCP be modified to 20 days and further that the hearing on pltff's motion for a speedy hearing on the merits will commence at 10:00 A.M. Monday, Sept. 18, 1978 Courtroom 12. (see for details) (N) Wilkey, J (USCA) Green, J. Pratt, J.
Aug	23	ORDER filed Aug. 22, 1978 directing Clerk to issue subpoenas and test as requested. (See order for details) (N) Pratt, J.
Aug	25	INTERROGATORIES AND REQUESTS for production of documents by Pltff pursuant to Rules 33 and 34, FRCP
Aug	25	REQUEST by Pltff for Admissions
Aug.	31	MOTION by Aaron E. Henry, et al. to intervene as defts.; P & A; Exhibit. Appearance of Richard T. Seymour (520 Woodward Bldg. 733 15th St., N.W., 20005 -Tel: 628-6700). $5.00 paid & credited to U.S. by Seymour.

SEE NEXT PAGE

DC 111A (Rev. 1/78)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 78-1425
STATE OF MISSISSIPPI	UNITED STATES OF AMERICA, et al.	PAGE 1 OF ___ PAGES

DATE	NR.	PROCEEDINGS
1978 Sept	01	ANSWER by defts. to first amended complaint. Appearance of Jeremy I. Schwartz.
Sept	01	CALENDARED.
Sept	01	REQUEST by defts. for reconsideration of motion for a speedy hearing on the merits; attachments I,II, & III.
Sept.	08	RESPONSE by Pltff in Opposition to Defts' Request for reconsideration of motion for a speedy hearing on the Merits; Table of Contents; Table of Authorities; Exhibit A.
Sept.	12	RESPONSE of the United States to motion to intervene.
Sept.	13	RESPONSE of pltf. in opposition to motion of Aaron Henry, et al. to intervene as defts; Affidavit of Frank W. Durham, Jr., Esq. with Attachment.
Sept.	14	INTERROGATORIES by daft. to pltf.
Sept.	14	RESPONSE by defts. to request of pltf. for admission.
Sept.	14	RESPONSE by defts. to interrogatories and requests for production of documents of pltfs; affidavit of Jeremy I. Schwartz; Attachment.
Sept.	15	DEPOSITION of Drew S. Days, III taken on 9-14-78 for the pltf.
Sept.	15	PRETRIAL memorandum by pltf; Attachments A thru E.
Sept	18	REQUEST (first) by Applicant/defendants-intervenors' for admission of facts and genuineness of documents; Exhibits 1 thru 12.
Sept	18	NOTICES (12) by pltf. to take the depositions of Jon Hinson, Evan Doss, Jr., John Hampton Stennis, Mary Mousy, James Carliss Sumner, Buddy Gresham, Charles Williams, William Green Poindexter, Edward S. Bishop, Terry Chew, Edward L. Snyder and John Hampton Stennis.
Sept	19	ORDER filed 9-18-78 granting motion of Aaron E. Henry, Henry J. Kirksey, Mary Hightower, Johnnie E. Walls, Charles Victor McTeer, Fred L. Banks, Jr., David Jordan, James E. Winfield, Bennie G. Thompson and Barney Schoby for leave to Intervene as defendants. (N) WILKEY, J.
Sept	18	APPEARANCE of Richard S. Kohn as counsel for intervenor-defendants.
Sept	18	REQUEST of defts. for speedy hearing on merits, denied as moot. Wilkey, J. (USCA) GREEN, J. PRATT, J.

(SEE NEXT PAGE)

DC 111A (Rev. 1/78)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 78-1425
STATE OF MISSISSIPPI	UNITED STATES OF AMERICA, et al.	PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS
1978 Sept	18	HEARING on merits, begun & respited to 10-19-78 at 9:30 A.M. (Reprters: Dennis K. Bossard and Ellen Woodson) WILKEY, J. (USCA) GREEN, J. PRATT, J.
Sept	18	ANSWER by defendants-intervenors to amended complaint (first) by pltf; P&A's.
Sept	19	NOTICES (7) by pltff. to take depositions of John Hampton Stennis, Edward S. Bishop, Edward L. Snyder, Perry Dillard, Charles Williams, Buddy Gresham & Mary Maxley.
Sept	19	HEARING resumed and respited to 9-20-78 at 10:00 A.M. (Rep: Dennis K. Bossard and Ellen Woodson) WILKEY, J. (USCA) GREEN, J. PRATT, J.
Sept	20	HEARING RESUMED and respited to 9-21-78 at 10:00 A.M. (Rep: A.M. Dennis K. Bossard and Ellen Woodson: P.M. Gloria Horning, Dennis K. Bossard and Ellen Woodson) WILKEY, J. (USCA) GREEN, J. PRATT, J.
Sept	20	MEMORANDUM of Law by pltf. in support of Objection to Introduction of Compromise Factors in Settlement Negotiations. (Rep: A.M. Dennis K. Bossard, Ellen Woodson: P.M. Gloria Horning, Dennis K. Bossard and Ellen Woodson) WILKEY, J. (USCA) GREEN, J. PRATT, J.
Sept	21	HEARING RESUMED and respited to 9-22-78 at 10:00 A.M. Judges Green and Wilkey not present for the remaining hearings, said judges will rely on the transcript with the approval of all counsel. (Rep: Dennis K. Bossard and Ellen Woodson) PRATT, J.
Sept	22	MOTION by pltf. to compel answers to oral questions on depositions and to written interrogatories; P&A's; Exhibit A.
Sept	22	HEARING resumed and respited to Monday, 9-25-78 at 9:30 A.M. Deft: to respond to pltfs. request for interrogatories within 10 days., Intervenor-defts. request of Admissions, Pltf. to respond by 9-25-78. (Rep: Dennis K. Bossard and Ellen Woodson) PRATT, J.
Sept	25	RESPONSE by pltf to interrogatories of defts. to pltf.
Sept	25	RESPONSE by pltf. to first request by deft-intervenors for admission of facts and genuineness of documents.
Sept	26	ANSWERS by deft. to interrogatories I; Affidavit of Jeremy I. Schwartz and affidavit of David H. Hunter with attachment.

(See next page)

DC 111A
(Rev. 1/78)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 78-1425
STATE OF MISSISSIPPI	UNITED STATES OF AMERICA, et al	PAGE 3 OF ___ PAGES

DATE	NR.	PROCEEDINGS
1978 Sept.	25	HEARING resumed and respited to 9-26-78 at 9:30 A.M. (Rep: Kennis K. Bossard and Ellen Woodson) PRATT, J.
Sept	26	ORDER filed 9-25-78 directing Assistant Attorney General Days, to respond to questions posed upon oral deposition and to answer other questions suggested by the responses; Dept. Department of Justice shall answer interrogatories 1-A, 1-B, 1-C, 1-D, 1-E, served by pltf. upon deft., under oath and to respond to such other questions and permitting pltf. to pursue further discovery suggested by the responses. (N) PRATT, J.
Sept	26	HEARING resumed and respited to 9-27-78 at 9:30 A.M. (Rep: Dennis K. Bossard and Ellen Woodson) PRATT, J.
Sept	27	MOTION by pltf. to take depositions of David Hunter, Gerald W. Jones and Gladys Lee; Attachment.
Sept	27	HEARING resumed and respited until hearing on final arguments are set. Court directs all counsel to submit proposed findings of fact and conclusions of law and legal memoranda to the count by 10-31-78 and with responses due by 11-15-78. (Rep: Dennis Bossard and Ellen Woodson) Pratt, J.
Oct.	03	ORDER filed 9/28/78 allowing pltff to take the depositions of 1. David Hunter, 2. Gerald W. Jones, 3. Gladys Lee with Notice properly given. (N) Pratt,J.
Oct.	12	TRANSCRIPT of proceedings of 9-18-78, Vol. I, pages 1-92. (Rep: D. Bossard); Court copy.
Oct.	12	TRANSCRIPT of proceedings of 9-19-78, Vol.II, pages 93-209. (Rep: D. Bossard); Court copy.
Oct.	12	TRANSCRIPT of proceedings of 9-20-78, Vol. III, pages 210-398. (Rep: D. Bossard); Court copy.
Oct.	12	TRANSCRIPT of proceedings of 9-21-78, Vol. IV, pages 399-601. (Rep: D. Bossard); Court copy.
Oct.	12	TRANSCRIPT of proceedings of 9-22-78, Vol. V, pages 602-806. (Rep: D. Bossard); Court copy.
Oct.	12	TRANSCRIPT of proceedings of 9-25-78, Vol. VI, pages 807-1043. (Rep: D. Bossard); Court copy.
Oct.	12	TRANSCRIPT of proceedings of 9-26-78, Vol. VII, pages 1044-1286. (Rep: D. Bossard); Court copy.
Oct.	12	TRANSCRIPT of proceedings of 9-27-78, Vol. VIII, pages 1287-1514. (Rep: D. Bossard); Court copy.
Oct	23	DEPOSITION of Gladys M. Lee taken on 10-4-78 for the pltf.

SEE OVER

: 111A
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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 78-1425
STATE OF MISSISSIPPI	U.S.A., et al.	PAGE 4 OF ___ PAGES

DATE	NR.	PROCEEDINGS
1978 Oct	26	NOTICE by pltf. to take deposition of Drew S. Days, III.
Oct	31	POST-Trial brief by pltf.
Oct	31	COPY of Deposition of Gerald W. Jones taken on Oct 4, 1978.
Oct	31	COPY of Deposition of Gladys M. Lee taken on Oct 4, 1978.
Oct	31	COPY of Deposition of David H. Hunter taken on Oct 4, 1978.
Oct	31	BRIEF for the United States; appendix.
Oct	31	POST-Trial memorandum of law by defts-intervenors.
Nov	15	DEPOSITION of Gerald W. Jones taken on Oct 4, 1978 for the pltf.
Nov	15	DEPOSITION of David H. Hunter taken on Oct 4, 1978 for the pltf.
Nov	15	REPLY Brief of pltf.
Nov	17	REPLY brief for intervenor-defts; Exhibit A. (Flat) Pratt, J.
Nov	21	CORRECTED copy of reply brief by pltfs; Attachment.
1979 Jan	11	MOTION by pltf. to reopen the record to receive additional evidence; memorandum; affidavit of Thomas Brooks Hofeller; attachment.
Jan	16	MOTION of pltf. for declaratory judgment heard and taken under advisement. (Rep: Vernell Marshall) WILKEY,J. - USCA GREEN,J. - USDC PRATT,J. - USDC

RESPONSE OF THE DEPARTMENT OF JUSTICE TO PLAINTIFF'S MOTION FOR AN EXPEDITED HEARING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78-1425
(Three Judge Court)

STATE OF MISSISSIPPI,

Plaintiff,

v.

UNITED STATES OF AMERICA, and
GRIFFIN B. BELL, ATTORNEY GENERAL
FOR THE UNITED STATES
individually and in his official capacity,

Defendants.

REQUEST FOR RECONSIDERATION OF MOTION FOR A SPEEDY HEARING ON THE MERITS

Respectfully submitted,

EARL J. SILBERT
United States Attorney
DREW S. DAYS III
Assistant Attorney General
GERALD W. JONES
PAUL F. HANCOCK
JEREMY I. SCHWARTZ
Attorneys, Civil Rights Division
Department of Justice
Washington, D.C. 20530

* * *

As will be discussed below, it would be appropriate for this Court to delay the hearing on the merits of plaintiff's request for declaratory relief until a final ruling by the *Connor* court so that the statutory plan before this Court may be compared with the plan approved in that litigation.

APPENDIX H

ORDERS AND PLEADINGS IN *CONNOR v. FINCH* IN THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3830 (A)

PEGGY J. CONNOR, et al.,

Plaintiffs,

vs.

CLIFF FINCH, et al.,

Defendants.

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

SUBMISSION BY THE UNITED STATES OF A SUBSTITUTE PRECINCT PLAN

Since formulating our initial proposals we have realized that the *Hinds County precincts used in our earlier proposal are not the current ones.* We have now corrected this situation as well as *several description errors in the earlier submission.*

* * *

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 6th day of February 1978 he served copies of the foregoing document with postage prepaid upon the following:

Honorable A. F. Summer
Attorney General
State of Mississippi
5th Floor
Gartin Justice Building
Jackson, Mississippi 39201

Frank R. Parker, Esq.
Lawyers' Committee for Civil Rights
Under Law
210 South Lamar Street
Suite 720
Milner Building
Jackson, Mississippi 39201

Jerris Leonard, Esq.
Suite 550
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

John D. Haynes, Esq.
P.O. Box 1
Baldwyn, Mississippi 38824

/s/ Frederick J. McGrath
FREDERICK J. McGRATH
Attorney, Civil Rights Division
Department of Justice
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

CIVIL ACTION NO. 3830 (A)

PEGGY J. CONNOR, et al.,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

CLIFF FINCH, et al.,

Defendants.

ORDER

Upon consideration of the objections filed by the plaintiffs, the Department of Justice, and on behalf of the Mississippi Legislature to the reapportionment plan proposed by the Special Master of this Court in this cause.

It appears to the Court that the differences among the various parties as to an appropriate reapportionment of the Mississippi Legislature are so narrow that they could easily be resolved among the parties themselves, motivated by a desire for agreement and the termination of this litigation, leading to the entry of an agreed decree.

THEREFORE, ORDERED

The parties are requested to meet in a settlement conference within fifteen (15) days of the entry of this order,

in which they are requested to explore every reasonable possibility for the entry of a consent decree, terminating this litigation except for such items as fixing appropriate attorneys' fees, compensation for the Special Master, and the like.

The Court requests the attorney for the plaintiffs to coordinate time and place for such a meeting among various counsel and also designates the attorney for the plaintiffs to report to the Court, in writing, whether an agreement has been reached.

SO ORDERED, this June 5, 1978.

/s/ J. P. Coleman
United States Circuit Judge

/s/ Dan M. Russell, Jr.
Chief United States District Judge

/s/ Harold Cox
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3830 (A)

PEGGY J. CONNOR, et al.,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

CLIFF FINCH, et al.,

Defendants.

COURT REPORTER'S TRANSCRIPT

Proceedings held in Jackson, Mississippi on January 2, 1979, before J. P. Coleman, United States Circuit Judge; Dan Russell, Chief Judge, United States District Court; and Harold Cox, United States District Judge.

* * *

BY JUDGE COLEMAN:

Thank you.

Well, the Court was hoping that this might be something that the parties could agree upon. And again making it a matter of record, that this is not intended to influence whatever may happen or may be about to happen in the District of Columbia, the fact remains that when they look at it in the basis of which I've stated and which is the result

of conference between Judge Cox, Judge Russell and myself, we're going to order that the Warren County vacancy be filled by an election in 30B as proposed by the plaintiffs.

Now if the plaintiffs seek later to read something into that more than what we've stated here today, why, that's part of the fortunes of litigation. But we'll get the vacancy filled and this is a 59.28 percent black majority district carved out of an existing district purely for the purpose of filling a vacancy and for that purpose only. And in that way we'll get all the vacancies filled.

Now we had an order that Mr. Parker's probably familiar with — I know he is, the rest of you too, for that matter, in which when we enacted the — we ordered the '75 plan we laid out the basis on which the vacancies would be filled, didn't we? And we said that future vacancies would be filled according to the plan we were then putting in effect, depending on the residence of the person who created the vacancy. But, of course, that single-member plan that we adopted didn't pass muster with the Supreme Court on population variations, so we don't have any more single-member districts, we've got these multi-members hanging over from '75.

So we have considered it fully and we think that's the best way to settle the matter. And we'll draw this in the form of two decrees. One representing the agreement of the parties, which we'll ask you all as counselors, as soon as we can get it drawn, to sign as being entered as a consent decree.

And then we'll enter a separate order, since it's not agreed to, as to this particular district.

I'm going to ask counsel for the government and for the plaintiffs and for the Attorney General to — can you draft that decree this afternoon? We'll ask you to draft the one you've agreed to and sign it and file it. We'll draft

the one that nobody has agreed to and set forth the basis upon which we're doing it.

I assume that, as the Attorney General states, you'll communicate these results to the Governor with the hope that he'll go on and order elections right away to fill these vacancies as we have described it.

BY MR. SUMMER:

I will, Your Honor.

BY JUDGE COLEMAN:

Okay. Anything further?

BY MR. PARKER:

Your Honor, would that also mean that under this plan there would be elections in 30 and 30A as well?

BY JUDGE COLEMAN:

Will not be. No, you say that to hold it in 30B without elections in 30 and 30A is satisfactory with you, and with the Department of Justice. And that being so, we already have expressed our concern about ordering people out of office who have been already elected, something we've never done before and something that the Supreme Court itself declined to do after our '75 elections.

BY MR. PARKER:

Would these decrees also provide that the Governor would order these special elections to take place at the earliest possible time and the earliest possible date?

BY JUDGE COLEMAN:

Consistent with the statutes of the State of Mississippi appertaining to the filling of legislative vacancies, yes.

BY MR. PARKER:

Thank you.

BY JUDGE COLEMAN:

I don't want to put it in the form of an order to the Governor. I think we should use some other language than that. I don't think the Governor would be disposed to try to exercise non-compliance with a court order in a case that he's a party to. Just let it be known in the appropriate language that the Court directs that these be the districts for the filling of these existing vacancies, and that the Governor is requested at the earliest possible time to call an election consistently with the statutes of the State of Mississippi on that subject. I don't want to order him to do something because I don't think he has to be ordered.

APPENDIX I

AFFIDAVIT OF THOMAS HOFELLER
(Without Attachments)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78-1425
(Three Judge Court)

STATE OF MISSISSIPPI,

Plaintiff,

v.

UNITED STATES OF AMERICA, and
GRIFFIN B. BELL, Attorney General

Defendants,

and

AARON E. HENRY, et al.,

Defendants-Intervenors.

AFFIDAVIT OF THOMAS BROOKS HOFELLER

State of California, County of Los Angles SS.

I, Thomas Brooks Hofeller, having been first duly sworn, depose and state as follows:

1. At the time of trial in the above styled case, it was my professional opinion that the reapportionment plans for the State of Mississippi, based on precincts, which had been prepared by the Plaintiffs (hereinafter the "Henderson Plan") and the Plaintiff Intervenor (hereinafter the "Tan-

ner Plan") in *Connor* v. *Finch*, and presented into evidence in the above styled case as Defendants' exhibit four (4) and Defendant-Intervenors' Exhibit three (3), were not statistically valid, and that both of these plans contained unconstitutional levels of population deviation from one man-one vote equality coupled with inaccurate representations of racial percentages resulting from the faulty methodology used in their construction.

2. I stated during the trial that, if I were to have the opportunity to examine Tanner's plan further, I would find evidence of errors in addition to those which I demonstrated during my testimony. (Tr. 1461)

3. Before I testified, I had not examined the Tanner or Henderson Plans in exhaustive detail. Such an examination had not been undertaken previously for several reasons. First, both the Tanner and Henderson Plans have been subjected to revision since their original submission to the Connor Court and I did not desire to undertake any analysis until they were firm. Secondly, Dr. Richard L. Morrill, Chairman of the Geography Department, University of Washington, who had been retained by the Joint Reapportionment Committee to examine the accuracy of these plans, had reported to me that both these plans contained numerous errors which made both these plans unusable as alternative reapportionment plans for Mississippi. Finally, any need for evaluation in connection with the *Connor* litigation had ceased. A proposed settlement of the Connor Case was based on a modified version of the State's reapportionment plans because of the recognition by the Connor plaintiff's that the State's plans contained the most credible data.

4. My concern that I factually demonstrate the accuracy of the opinion that I had given in court caused me to undertake, with the permission of the Joint Reapportionment Committee, a more thorough examination of the Tanner and Henderson Plans.

5. This examination was conducted using the detailed precinct maps of the Joint Committee with enumeration district overlays on the same scale. Furthermore, in cases in which enumeration district splits were not available, from the Bureau of the Census, I used the "house count" method, designated as superior by Henderson to the geographic or cultural method of splitting enumeration districts used by Tanner. I do not subscribe to Henderson's opinion as to the adequacy of the "house count" method, but due to time constraints which did not permit obtaining "splits" from the Census Bureau itself, I decided to utilize Henderson's method in lieu of Tanner's cultural-geographic method. This decision was based, in part on discussions, subsequent to trial, with Mr. Marshall Turner, Director of User Services for the Bureau of the Census. Mr. Turner informed me that a census study of the cultural-geographic method which Mr. Tanner had used to justify his use of that particular methodology for the splitting of enumeration districts in his plan was not statistically valid. Indeed, I was surprised to learn that Mr. Tanner had been informed by Turner prior to Tanner's trial testimony that the study of the cultural-geographic method was not sufficiently accurate to permit use of the data derived as evidence in Court. Mr. Turner had recommended to Tanner that he not cite the study as authority for his methods to the Court.

6. Upon conclusion of my post-trial examination of the Tanner and Henderson Plans, the correctness of my professional opinion given before this Court was conclusively verified.

7. In the Henderson Plan, deviations up to 54.36 percent in excess of ideal district population and up to 68.36 percent below ideal district population were found. Thus, Henderson's Plan contains a total deviation of 122.72%. This total deviation was accompanied by numerous examples of deviations in excess of the acceptable standard of 10 percent from highest to lowest district.

8. In the Tanner Plan, deviations up to 24.74 percent above and 28.28 percent below the ideal district population were found. Thus, Tanner's Plan contains a total deviation of 53.02 percent. This total deviation was accompanied by numerous examples of deviations in excess of the acceptable standard of 10 percent from highest to lowest district.

9. I am submitting with this affidavit detailed maps of both the Henderson and Tanner plans which I have prepared based upon the district submissions contained in those plans. I did this because the map presented by Tanner with his plan masked the true appearance of the shape of many of his districts and because Henderson submitted no map of his plan. Examination of these maps reveals:

a. Non-contiguous districts in both plans. (See Henderson district 87 and Tanner districts 91 and 5.)

b. Districts in the Tanner plan far more irregular in shape than any comparable districts in the State's plan. (See Tanner districts 17, 81, 85, 92, and 102.)

c. Districts in the Henderson plan far more irregular in shape than any comparable districts in the State's plan. (See Henderson districts 7, 30, 51, 103, 106, and 108.)

10. My post-trial review has confirmed my opinion that neither plan, Tanner's or Henderson's, is acceptable either as a complete plan or as a standard against which any other plan should be compared. They are inaccurate and inappropriate to the extent that no professional reapportionment effort could be based on them.

/s/ Thomas Brooks Hofeller
THOMAS BROOKS HOFELLER

Subscribed and sworn to before me this 19th day of December, 1978.

/s/ Evelyn M. Desjarlais
EVELYN M. DESJARLAIS
Notary Public

[Official Seal]